

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Exemption – Remotely Piloted Aircraft Disruption) Determination 2022

Authority

The Australian Communications and Media Authority (**ACMA**) has made the *Radiocommunications (Exemption – Remotely Piloted Aircraft Disruption) Determination 2022* (**the instrument**) under subsection 27(2) of the *Radiocommunications Act 1992* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Under subsection 27(2) of the Act, the ACMA may determine that acts or omissions by members of a class of persons performing a function or duty in relation to, among other things, the Australian Federal Police (**AFP**) or the police force of a State or Territory, are exempt from certain provisions of the Act.

Subsection 33(3) of the AIA 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.

Purpose and operation of the instrument

The instrument repeals the *Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020* (**the 2020 exemption**), which was due to self-repeal on 10 October 2022, and provides for a new exemption to ensure that the functions and duties of police forces are not interrupted by the repeal of the 2020 exemption. There are some changes to enhance protections for contractors and potential contractors of police forces and to update terminology.

As the use of remotely piloted aircraft (**RPA**) and remotely piloted aircraft systems (**RPAS**), or ‘drones’, becomes increasingly widespread, there are growing concerns about malicious drone use and the risks that drones could pose to public safety and national security.

The Commonwealth is undertaking various initiatives to facilitate and regulate the use of drones in Australia. This includes managing the public safety and security risks of RPA and RPAS through relevant security and enforcement policy initiatives. It is possible that future legislative amendments that support these initiatives will provide a legislative basis to manage the risks that RPA and RPAS could pose to public safety and national security, but under the current legislative framework, an exemption under the Act is necessary to facilitate access to and the use of devices designed to disrupt or disable RPA and RPAS (**counter-drone devices**). The 2020 exemption was due to self-repeal in 2022, on the basis that amendments to the broader legislative framework would be in place by that time. However, the COVID-19 pandemic introduced several delays to the legislative review. The instrument is required to ensure that access to, and use of, counter-drone devices by certain persons is exempt under the Act, pending completion of that review.

The instrument provides an exemption for members of the AFP and of the various State and Territory police forces (each a **police force**) from particular provisions of the Act in relation to the use of counter-drone devices, which might otherwise contravene the Act.

The purpose of the instrument is to facilitate the use of these devices by Australian police forces as a means to counter threats posed by RPA and RPAS to critical infrastructure, public safety and national security. The instrument will enable a member of a police force to deploy counter-drone

devices to protect major events and to respond rapidly where counter-drone capability is required at short notice.

The Act requires radiocommunications devices to be licensed, and for persons to comply with obligations and prohibitions imposed by equipment rules in relation to those radiocommunications devices and other equipment, and provides for offences and civil penalties related to causing interference to radiocommunications. These requirements are set out in Parts 3.1, 4.1 and 4.2 of the Act.

In particular, in Part 4.1, the operation, possession, supply and offer to supply, of specified equipment may be prohibited if the ACMA imposes a permanent ban on that equipment under section 172 of the Act.

Where the ACMA has imposed a permanent ban on a equipment, the *Customs (Prohibited Imports) Regulations 1956 (the Customs Regulations)*, made under the *Customs Act 1901*, provide that the importation into Australia of such equipment is prohibited, unless the conditions, restrictions or requirements for that equipment are met (subregulation 4(2)). The Customs Regulations specify that the equipment must not be imported by a person unless a determination in force under subsection 27(2) or 302(2) of the Act applies in relation to the importation by the person (item 11 of Schedule 3 to the Customs Regulations).

Subsection 27(2) of the Act allows the ACMA to determine that acts or omissions of persons to whom section 27 applies are exempt from all or any of Parts 3.1, 4.1 and 4.2 of the Act. Subsection 27(1) of the Act defines to whom the section applies, including ‘a person performing a function or duty in relation to ... (b) the Australian Federal Police or a police force of a State or Territory.’

The capacity of the ACMA to determine exemptions applies to all persons performing duties or functions *in relation to* defence, security, international relations as well as *in relation to* various law enforcement and emergency services bodies and organisations which are either named or generically described in subsection 27(1). The exemption power is not confined to members of those bodies and organisations but is intended to extend to those persons who may play an important auxiliary role in relation to the duties and functions of those bodies, such as technical experts who need to use, operate or possess the relevant devices.

The exemptions provided by the instrument extend to a ‘contactor’, a ‘potential contractor’, and a ‘primary potential contactor’, which terms are defined in section 6 of the instrument.

Such persons may be capable of supplying devices to a police force benefitting from the instrument, or may have a contract with a police force for the provision of testing or maintenance, or training in the use, of those devices. These are functions in relation to the AFP or the police force of a State or Territory. As such, the ACMA has the power to exempt these persons from the application of Parts 3.1, 4.1 and 4.2 of the Act to the performance of those functions and has done so, subject to the limitations and safeguards set out in the instrument.

Without the instrument providing an exemption for contractors and potential contractors in this way, the police forces covered by the instrument may not be able to acquire devices, have access to properly-tested and properly-maintained devices, or may not be able to be trained in their use.

The instrument exempts certain acts and omissions of a member of a police force from the operation of Parts 3.1, 4.1 and 4.2 of the Act in relation to devices, used for certain police activities. It also exempts certain acts and omissions of a **contractor** (persons who have entered into a contract with a police force to perform a specified testing, training or maintenance function or duty in relation to that police force) in relation to the devices.

In order to be exempt, the acts or omissions of a police force must be done, or occur:

- in the performance of the member of a police force's functions and duties in relation to the promotion of safety, security or protection of persons or property; and
- in relation to specified activities for the procurement or supply, operation, testing or maintenance of, or training in the use of, a device; and
- if the device is operated, in compliance with the requirement to keep a record, and the requirement to provide a record to an authorised person, if that authorised person makes a written request.

The exemption only applies to the acts or omissions of a contractor where the act is done or the omission occurs:

- in the performance of the contractor's functions and duties under the **relevant contract**; and
- in relation to the testing or maintenance of a device, or training in relation to a device, or supplying the device;
- if the device is operated, in compliance with the requirement of the relevant police force to keep a record; and
- the police force with whom the contractor has entered into a relevant contract must have complied with the requirement to provide a record to an authorised person, if that authorised person makes a written request.

The instrument also provides a limited exemption for **potential contractors**, in relation to an offer to supply a device.

In each case, the exemption applies only to devices that can be used on the frequency bands (**relevant frequency bands**) mentioned in:

- items 12 – 23A, 36 – 41, and 54 – 63 in Schedule 1 to the *Radiocommunications (Low Interference Potential Devices) Class Licence 2015 (the class licence)* as in force at the commencement of the instrument; and
- footnote number 150 in Part 4 of the *Australian Radiofrequency Spectrum Plan 2021* as in force at the commencement of the instrument.

The relevant frequency bands include frequencies that are used for public mobile telecommunications services (**PMTS**). As such, the use of devices on these bands might contravene sections 175 and 176 of the Act, because of the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011*.

Management of risk associated with the use of devices designed to disrupt or disable RPA or RPAS

In the event that a counter-drone device is operated by a member of a police force or a contractor, there is a risk that the device may affect a range of devices and services operating within the relevant frequency bands for the period the device is active. The relevant frequency bands include frequencies on which RPA and RPAS may potentially operate in Australia, and on which RPA and RPAS from overseas markets may be configured to operate. Devices and services operating in the relevant frequency bands include a wide range of commercial and consumer low power devices, such as Wi-Fi devices, industrial scientific and medical equipment (such as plastic welders, microwave ovens, and chemical analysis equipment not used for communications), and PMTS.

In considering whether to make the exemption, the ACMA weighed the benefits of police forces having access to devices that can effectively address the safety and security risks posed by RPA and RPAS, against the potential impact on other spectrum users.

Noting the low likelihood of counter-drone devices being activated, the ACMA formed the view that the public benefit associated with operating a device to deal with RPA and RPAS that pose a risk to public safety would outweigh the adverse effects and consequences associated with incidental interference of a short duration being caused to the devices and services operating in the relevant frequency bands.

The potential adverse effects associated with use of counter-drone devices are mitigated in a number of ways:

- The operation of RPA and RPAS is also subject to the *Civil Aviation Regulations 1988* and the *Civil Aviation Safety Regulations 1998*, which are enforced by the Civil Aviation Safety Authority (CASA). Police force activities involving disrupting or disabling RPA and RPAS may be subject to the operation of those regulations, and any specific arrangements made by CASA in relation to those activities.
- When operating a counter-drone device, members of a police force remain subject to all other laws and policies which apply to their conduct as police officers.
- The instrument provides an exemption to a limited class of persons – i.e. police forces, and contractors where the services to be performed include the testing or maintenance of a device, or training in the use of a device. Further, the contractor must only use, operate, possess or supply a device in relation to these testing, training or maintenance activities. Potential contractors are only exempt in relation to an offer to supply a device.
- The instrument provides that, when a member of a police force, or a contractor, operates a device, a record must be kept of the date, time and location of the operation, and the purpose for which the device was operated.
- If an authorised person requests, in writing, that a police force provide the ACMA with a record, the police force must comply with that request within 10 business days of receiving the request, or such longer period as agreed by an authorised person.

Additionally, the exemption applies only in relation to the relevant frequency bands. Many devices operating in those bands, especially those operating under the class licence, do so under the ACMA's 'no protection policy' and are not afforded protection from interference. The ACMA's 'no protection policy' is consistent with the Radio Regulations of the International Telecommunication Union.

In relation to facilitating deployment of counter-drone devices by police forces, the ACMA has noted that because people deploying radiocommunications services under the class licence should have regard to the 'no protection' policy in doing so, there is a good understanding that the relevant frequency bands included in the class licence should not be exclusively relied upon for safety and security-critical services. Additionally, devices operating under the class licence do not use the relevant radiofrequency bands on an exclusive basis, but rather share those bands with many other devices and services. Devices operating under the class licence are generally not expected to suffer interference; however, an individual device may experience interference arising from the particular circumstances of the device's operation.

The ACMA also considered that police forces have considerable strategic and operational experience in the management of risks associated with the deployment of counter-drone measures. The police forces to whom the instrument applies have effectively deployed counter-drone devices at major events without incidents of interference to radiocommunications. Instruments authorising these

activities under the Act have included the *Radiocommunications (Commonwealth Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018*, the *Radiocommunications (Invictus Games Anti-Drone Technology/RNSS Jamming Devices) Exemption Determination 2018*, the *Radiocommunications (Unmanned Aircraft and Unmanned Aircraft Systems) Exemption Determination 2019*, and the 2020 exemption.

The ACMA also noted that police forces have extensive experience in the management and deployment of jamming devices that support bomb disposal activities, under the *Radiocommunications (Prohibited Devices) (Use of Electronic Counter Measures for Bomb Disposal Activities) Exemption Determination 2010*.

Beyond the site of operation, the extent of any incidental interference caused by the operation of a counter-drone device to disable a RPA or RPAS would be dependent on a range of factors, including natural and man-made geography and structures, and the technical characteristics of services operating in frequency bands adjacent to the relevant frequency bands. Incidental interference beyond the site of operation is likely to be of short duration, and further limited by the direction in which the device is pointed.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Although the instrument is subject to the sunset provisions of the LA, the instrument repeals itself on the fifth anniversary of its commencement.

Documents incorporated by reference

The instrument incorporates by reference the following Acts, as in force from time to time:

- the Act;
- the *Australian Communications and Media Authority Act 2005*.

In accordance with section 314A of the Act, the instrument incorporates by reference the following legislative instruments, as in force at the commencement of the instrument:

- the *Radiocommunications (Low Interference Potential Devices) Class Licence 2015*; and
- the *Australian Radiofrequency Spectrum Plan 2021*.

These Acts and legislative instruments can be accessed, free of charge, on the Federal Register of Legislation (<http://www.legislation.gov.au>)

Consultation

Before the instrument 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.

The ACMA undertook public consultation for the period commencing on 7 July 2022 and concluding on 4 August 2022. A consultation paper and draft instrument were made available for public comment on the ACMA website. The instrument was released as part of a broader consultation on draft instruments relating to banned equipment and exemptions under the Act.

The ACMA also directly notified stakeholders in a position to offer specialist views about the proposed arrangements. These stakeholders were Airservices Australia, Australian Border Force, AFP, Boeing, CASA, Corrective Services NSW, Department 13, Department of Defence, Department

of Home Affairs, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, DroneShield, New South Wales Crime Commission, Nova Systems, Open Spectrum, Optus, PACCAR Australia, Panasonic, Pivotel, QinetiQ, Telstra, Transport for NSW and TPG Telecom.

The ACMA received 8 submissions that offered commentary on the draft instruments included in the consultation, some of which offered specific views on the instrument. Submissions were received from the AFP, Airservices Australia, Australian Mobile Telecommunications Association, Department 13, DroneShield, Optus, Telstra and TPG Telecom.

Stakeholders generally acknowledged that, in certain circumstances, there is public benefit in facilitating the use of otherwise banned equipment. There was agreement that there are public safety and national security risks posed by malicious RPA and RPAS and that the public interest can be well served by facilitating the operational needs of police in respect of using counter-drone devices to deal with malicious RPA and RPAS.

While the submissions acknowledged that deployment of such technologies could involve a separate set of risks – namely, interference to radiocommunications services – one submission also conveyed that “due consideration needs to be given for the public benefit of such capabilities in the context of actual impact to other users”. The ACMA noted these concerns, and agreed that, on balance, the activation of devices that can cause temporary interference to licensed radiocommunications services is a proportional response to scenarios where the risks of not intervening are likely to be unacceptable from a public safety or security stance.

Several submissions proposed that counter-drone technologies be facilitated within the radiocommunications licencing system as opposed to being the subject of an exemption. The ACMA noted that devices that are designed to cause interference to radiocommunications are not compatible with the licensing system, and that exemption determinations remain the only way to lawfully facilitate possession, operation, supply and offer to supply of banned equipment.

Some submissions from mobile network operators suggested that the instrument should be more restrictive in respect of the specific types of police operations that were exempt, that it should not extend to all Australian police (but rather that it apply to the AFP alone and that all other state and territory police forces be granted separate exemptions on a case-by-case basis), and that police be required to routinely provide information about their operational activities to mobile network operators.

The ACMA noted that a case-by-case approach to exempting individual police forces would reverse the existing arrangements applying to Australian police in the 2020 exemption. The ACMA considered that the existing arrangements had performed well, and that there were no strong reasons to narrow the legal or operational scope of these arrangements. The ACMA considered that it was not appropriate to require police to routinely provide mobile network operators with what can be sensitive information about their operational activities, and that the existing arrangements contained sufficient means to ensure that police remained accountable. Specifically, the instrument places record keeping requirements on police and on contractors. These requirements allow the ACMA to monitor the operation of the instrument, and to correlate reported incidents of interference against use of devices and to respond accordingly.

Regulatory impact assessment

The Office of Best Practice Regulation (**OBPR**) has conducted a preliminary assessment of the instrument based on information provided by the ACMA. The OPBR advised that a Regulatory

Impact Statement was not required because the instrument was minor or machinery in nature (OBPR reference number OBPR22-02524).

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 to be prepared in respect of that legislative instrument.

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

Notes to the *Radiocommunications (Exemption – Remotely Piloted Aircraft Disruption) Determination 2022*

Section 1 Name

Section 1 provides for the instrument to be cited as the *Radiocommunications (Exemption – Remotely Piloted Aircraft Disruption) Determination 2022*.

Section 2 Commencement

Section 2 provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at <http://www.legislation.gov.au>.

Section 3 Authority

Section 3 provides that the instrument is made under subsection 27(2) of the *Radiocommunications Act 1992*.

Section 4 Repeal

Section 4 provides that the *Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020* [F2020L01296] is repealed.

Section 5 Repeal of this instrument

Section 5 provides that the instrument will be repealed five years after it commences.

Section 6 Interpretation

Section 6 defines key terms used in the instrument.

A number of other expressions used in this instrument are defined in the Act.

Section 7 References to other instruments

Section 7 provides that in the instrument, 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 or writing is a reference to that other instrument or writing as in force or in existence from time to time.

The definition of *relevant frequency bands* in section 5 demonstrates a contrary intention in relation to the incorporation of the instruments mentioned in that definition.

Section 8 Exemption – police forces and contractors

Section 8 exempts the acts and omissions of members of a police force and contractors from the operation of Parts 3.1, 4.1 and 4.2 of the Act, and the acts and omissions of potential contractors from subsections 175(2) and 176(2) of the Act, if those acts or omissions occur in particular circumstances, set out in subsequent sections.

Section 9 Exemption – circumstances in which the exemption applies – members of a police force

Section 9 provides the circumstances in which section 8 applies in the case of members of a police force. In order for the acts or omissions of a member of a police force to be exempt, those acts or omissions must be done, or occur, in the performance of the person's functions and duties in relation to the promotion of safety, security or protection of persons or property. Further, the act or omission must be in relation to the use, operation, possession, supply, maintenance of, or training in the operation of, a device to disrupt or disable RPA or RPAS. In each case, the act or omission must also be done or occur only within the relevant frequency bands. If the act or omission involves the use or operation of a device, a member of the relevant police force must have kept a record of each previous use or operation of the device, and must have complied with each request under section 11 made before the use or operation.

Section 10 Exemption – circumstances in which the exemption applies – contractors

Section 10 provides the circumstances in which section 8 applies in the case of contractors. In order for the acts or omissions of a contractor to be exempt, those acts or omissions must be done, or occur, in the performance of that contractor's functions or duties (the contractor will have a contract with a police force to perform a function or duty in relation to testing and maintenance of, or provision of training with, or the supply of devices designed to disrupt or disable RPA or RPAS). In each case, the act or omission must also be done or occur only within the relevant frequency bands. If the act or omission involves the use or operation of a device, a member of the relevant police force with which the contractor is dealing must have kept a record of each previous use or operation of the device, and must have complied with each request under section 11 made before the use or operation.

Section 11 Request – provision of records

In accordance with subsection 27(2A) of the Act, section 11 provides that an authorised person (the ACMA, a member of the ACMA or a Senior Executive Service employee of the ACMA) may request, in writing, that a police force provide the ACMA with a record kept under section 9 or 10, and that police force must comply with that request within ten business days, or such longer period as agreed by an authorised person. It also provides that an authorised person may withdraw such a request.

Section 12 Exemption – circumstances in which the exemption applies – potential contractors.

Section 12 provides the circumstances in which section 8 applies to potential contractors. In order for the acts or omissions of a potential contractor to be exempt, those acts or omissions must be done, or occur, for the purpose of a potential contractor offering to supply a device to a police force.

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 (Exemption – Remotely Piloted Aircraft Disruption) Determination 2022

Overview of the instrument

The instrument provides an exemption to members of the Australian Federal Police, and the police forces of Australian States and Territories, and persons who have a contract with those police forces in relation to certain devices, from the operation of Parts 3.1, 4.1 and 4.2 of the Act. It also exempts potential suppliers of devices to police forces from the operation of subsections 175(2) and 176(2) of the Act. The purpose of the instrument is to allow police forces to obtain and use devices that are designed to disrupt or disable remotely piloted aircraft (**RPA**) or remotely piloted aircraft systems (**RPAS**), where there is an identified risk to public safety or national security. The instrument also authorises associated activities undertaken by police forces and persons having a contract with police forces that might need to occur—namely, supply, testing, training and maintenance activities.

There is a risk that a device operating in the relevant frequency bands under the instrument may affect a range of radiocommunications devices, including those used for public mobile telecommunications services (**PMTS**) or radio-navigation satellite services, those authorised under the *Radiocommunications (Low Interference Potential Devices) Class Licence 2015*, or those operating on frequencies identified in a certain part of the *Australian Radiofrequency Spectrum Plan 2021*, for the period the device is active.

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 expression in Article 19 of the *International Covenant on Civil and Political Rights*. The operation of a device in the relevant frequency bands, and in the circumstances specified, may have the possible effect of disrupting for example, the Wi-Fi connection of public users, and the quality of PMTS.

The right to freedom of expression includes the right to seek, receive and impart information and ideas through any media of a person's choice, but is subject to certain restrictions, including the protection of national security or public order.

In the event of a device being operated to disable RPA or RPAS, the use of the device is, as a matter of practice, limited to the flight path of the RPA or RPAS, and the device is only operated for the amount of time necessary to deal with the threat. Operation of the devices during testing, training and maintenance activities is intended be kept to a minimum, and practical steps can be taken by operators of the device to minimise or eliminate any adverse effects associated with incidental emissions from the devices.

Use of the device in the relevant frequency bands may result in some limitation on the right to freedom of expression. However, it does so consistently with Article 19, in a manner that is reasonable and necessary. Any limitation would only be for a small amount of time and proportionate to activities directly related to, or expressly intended to support, the protection of public safety and national security.

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 could affect the right of freedom of expression; however, any effect is limited and proportional to the purpose of achieving public safety and protecting national security.

Conclusion

The instrument is compatible with human rights because any limitation on the right of freedom of expression is limited in a manner which is reasonable, necessary and proportionate to the purpose of protecting public safety and national security.