

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Exemption – Bomb Disposal Electronic Counter Measures) Determination 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Exemption – Bomb Disposal Electronic Counter Measures) Exemption Determination 2023 (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 27(2A) of the Act provides that a determination made under subsection 27(2) may confer a power to make a decision of an administrative character on the ACMA.

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 (Prohibited Devices) (Use of Electronic Counter Measures for Bomb Disposal Activities) Exemption Determination 2010 (the 2010 exemption)*, which was due to sunset on 1 April 2023. The instrument provides for a new exemption to ensure that the functions and duties of police forces are not interrupted by the repeal of the 2010 exemption.

Radiocommunications devices, such as mobile handsets, can be used to remotely detonate bombs, which are also called **improvised explosive devices** (things made or placed in an improvised way that incorporate destructive, lethal, noxious, pyrotechnic or incendiary chemicals and are designed to destroy, incapacitate, harass or distract). A device that is designed to interfere with, disrupt, distort or disturb radiocommunications (**electronic counter measure device**) can be used to counteract this threat, and can also protect persons responsible for disposing of bombs from harm.

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 electronic counter measure devices, which might otherwise contravene the Act.

The purpose of the instrument is to facilitate the use of electronic counter measure devices by Australian police forces as a means to counter various threats posed by improvised explosive devices such as to critical infrastructure and other property, public safety, national security, and the safety of police forces. For example, the instrument will enable a member of a police force to deploy an electronic counter measure device to protect people at major events and to respond rapidly where electronic counter measure 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 of the Act, 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. Also under Part 4.1, the operation, supply and offer to supply, of specified equipment may be prohibited if the ACMA imposes an interim ban on that equipment under section 167 of the Act.

The ACMA has imposed a permanent ban on particular equipment. Public mobile telecommunication service (**PMTS**) jamming equipment, radionavigation-satellite service (**RNSS**) jamming equipment, and radio local area network (**RLAN**) and remotely piloted aircraft system (**RPAS**) jamming equipment are banned under the *Radiocommunications (Jamming Equipment) Permanent Ban 2023* (the **permanent ban**).

An electronic counter measure device may be an item of banned equipment for the purposes of the permanent ban, or may be subject to an interim ban.

Where the ACMA has imposed a permanent ban or an interim ban on 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 electronic counter measure devices.

The exemptions provided by the instrument extend to a ‘contractor’, a ‘potential contractor’, and a ‘primary potential contractor’, which are terms 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 supply, testing, maintenance or repair, research and development, or the provision of training in the use, of electronic counter measure devices. These are acts 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 for the performance of those acts, or any omissions, 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 electronic counter measure devices, have access to properly tested and properly maintained electronic counter measure devices, or may not be able to be trained in their use.

Therefore, the instrument exempts certain acts and omissions of a **contractor** (persons who have entered into a contract with a police force) in relation to electronic counter measure devices from the operation of Parts 3.1, 4.1 and 4.2 of the Act. The instrument also 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 electronic counter measure devices, used for certain police activities.

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

- for the purpose of preventing the detonation or use of an improvised explosive device; or
- in the course of, or for the purpose of, training a member of a police force in the operation and use of an electronic counter measure device to prevent the detonation or use of improvised explosive devices; or
- in relation to the supply of, or an offer to supply, an electronic counter measure device to a police force for the purpose of preventing the detonation or use of improvised explosive devices; or
- in relation to the testing of an electronic counter measure device that has been, or is proposed to be, supplied to a police force for the purpose of preventing the detonation or use of improvised explosive devices; or
- in relation to the maintenance or repair of an electronic counter measure device that has been, or is proposed to be, supplied to a police force for the purpose of preventing the detonation or use of improvised explosive devices; or
- in relation to research and development involving an electronic counter measure device for the purpose of preventing the detonation or use of improvised explosive devices;

and is 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 instrument also provides a limited exemption for potential contractors, in relation to an offer to supply an electronic counter measure device to a police force.

Management of risks associated with the use of an electronic counter measure device

In the event that an electronic counter measure device is operated by a member of a police force or a contractor, there is a risk that the electronic counter measure device may affect a range of radiocommunications devices and services for the period the device is active. Affected devices and services could include a wide range of commercial, consumer, government and safety services, including those facilitated by PMTS, RNSS, RLAN devices and RPAS.

In considering whether to make the exemption, the ACMA weighed the benefits of police forces and contractors having access to electronic counter measure devices that can effectively prevent the detonation or use of an improvised explosive device, against the potential impact on other spectrum users.

Noting the low likelihood of an electronic counter measure device being activated, the ACMA formed the view that the safety of the public and police forces, and the protection of property, associated with operating an electronic counter measure device to prevent the detonation or use of an improvised explosive device, would outweigh the adverse effects and consequences associated with incidental interference of a short duration being caused to the devices and services affected by the electronic counter measure device.

The potential adverse effects associated with use of an electronic counter measure device are mitigated in a number of ways:

- The instrument provides an exemption to a limited class of persons – that is, a member of a police force, a contractor, or a potential contractor.
- The exemption only applies to a member of a police force or to a contractor in relation to the use of an electronic counter measure device in a limited set of circumstances, relevant to dealing with an improvised explosive device; it does not exempt acts or omissions in relation to an electronic counter measure device more generally.

- The exemption only applies to a potential contractor in relation to the offer of supply of an electronic counter measure device to a police force; potential contractors are not exempt in relation to broader use or supply or offer of supply of an electronic counter measure device.
- The instrument provides that, when a member of a police force, or a contractor, operates an electronic counter measure device, a record must be kept of the date, time and location of the operation, and the purpose for which the electronic counter measure 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.
- When operating an electronic counter measure device, a member of a police force remains subject to all other laws and policies which apply to those police.

The ACMA also considered that police forces have considerable strategic and operational experience in the management of risks associated with the use of electronic counter measure devices, having effectively deployed electronic counter measure devices under the 2010 exemption.

Beyond the site of operation, the extent of any incidental interference caused by the use of an electronic counter measure device would be dependent on a range of factors, including natural and artificial geography and structures, and the technical characteristics of services operating in frequency bands adjacent to affected frequency bands. Incidental interference beyond the site of operation is likely to be of short duration, and further limited by the direction in which an electronic counter measure 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.

Automatic repeal of the instrument after 5 years will ensure that the ACMA conducts a timely review of the operation of the instrument.

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*.

These Acts can be found 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 from 7 July 2022 to 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; the AFP; Australian Mobile Telecommunications Association (**AMTA**); Boeing; Civil Aviation Safety Authority; Corrective Services NSW; Department 13; Department of Defence; Department of Home

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

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, AMTA, 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. While 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 use of electronic counter measure devices that can cause temporary interference to licensed radiocommunications services is a proportional response to preventing the use or detonation of an improvised explosive device. The ACMA was satisfied that the instrument would facilitate that proportionate response.

Some submissions from mobile network operators suggested that the instrument should require that police forces provide information about their operational activities to mobile network operators. The ACMA carefully considered those submissions, and formed the view that it was not appropriate to require police forces 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 forces remained accountable. Specifically, the ACMA notes that the instrument places record keeping requirements on police forces (including in relation to use by contractors). The ACMA also took into account that these requirements allow the ACMA to monitor the operation of the instrument, and to correlate reported incidents of interference against use of electronic counter measure devices and to respond accordingly. The ACMA considered that police forces had effectively used electronic counter measure devices to deal with improvised explosive devices for a sustained period of time under the 2010 exemption.

Regulatory impact assessment

The Office of Impact Analysis (**OIA**) has conducted a preliminary assessment of the instrument based on information provided by the ACMA. The OIA advised that a Regulatory Impact Statement was not required because the instrument was minor or machinery in nature (OIA reference number OBPR22-02508).

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 at **Attachment B** has been prepared to meet that requirement.

Notes to the *Radiocommunications (Exemption – Bomb Disposal Electronic Counter Measures) Determination 2023*

Section 1 Name

Section 1 provides for the instrument to be cited as the *Radiocommunications (Exemption – Bomb Disposal Electronic Counter Measures) Determination 2023*.

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 (Prohibited Devices) (Use of Electronic Counter Measures for Bomb Disposal Activities) Exemption Determination 2010* [F2010L00821] 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 the 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.

Section 8 Exemption – police forces, contractors and potential contractors

Section 8 provides that an act or omission by a member of a police force or a contractor is exempt from all of Parts 3.1, 4.1 and 4.2 of the Act, if one or more of the circumstances specified in section 9 exists, and all of the circumstances specified in section 10 exists.

Section 8 also provides that an act or omission by a potential contractor is exempt from subsections 170(2), 175(2) and 176(2) of the Act if the circumstance specified in section 12 exists.

Section 9 Exemption – general circumstances in which the exemption applies to police forces and contractors

Section 9 provides circumstances in which section 8 applies to a member of a police force and to a contractor. The circumstances relate to acts or omissions involving preventing the detonation or use of an improvised explosive device, and to supplying, offering to supply, and using (in various specified circumstances) electronic counter measure devices to prevent the detonation or use of improvised explosive devices.

Section 10 Exemption – circumstances in which the exemption applies to police forces and contractors – record keeping

Section 10 provides circumstances in which section 8 applies. If the act or omission involves the use or operation of an electronic counter measure device, a member of the relevant police force must have kept a record of each previous use or operation of the electronic counter measure 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 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 – circumstance in which the exemption applies to potential contractors

Section 12 provides the circumstance 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 an electronic counter measure 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 – Bomb Disposal Electronic Counter Measures) Determination 2023

Overview of the instrument

The instrument provides an exemption to members of the AFP and the police forces of a State or Territory, and certain persons who have a contract with those police forces, from the operation of Parts 3.1, 4.1 and 4.2 of the Act. It also provides a narrower exemption to potential contractors.

The purpose of the instrument is to allow relevant police forces to obtain and use electronic counter measure devices to prevent the detonation or use of improvised explosive devices.

There is a risk that electronic counter measure devices used by police forces or by contractors under the instrument may affect a range of radiocommunications services and devices, including PMTS, and RLAN devices.

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 an electronic counter measure device may have the possible effect of disrupting, for example, the Wi-Fi connection of public users (with Wi-Fi connections facilitated by RLANs), or 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, and it is subject to certain restrictions, including the protection of national security or public order.

Electronic counter measure devices may result in some limitation of the right to freedom of expression. However, they would do so consistently with Article 19, in a manner that is reasonable, necessary and proportionate. Any limitation would only be for a small amount of time and proportionate to activities directly related to, or expressly intended to support, public safety, safety of police forces, and protection of property.

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 preventing the detonation or use of improvised explosive devices, or undertaking activities intended to support that purpose, all of which are in the furtherance of the protection of national security and public order.

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.