

# EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

*Radiocommunications Act 1992*

## ***Radiocommunications (Exemptions) Amendment Determination 2023 (No. 1)***

### **Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Exemptions) Amendment Determination 2023 (No. 1)* (**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**).

Subsection 27(2) of the Act allows the ACMA to determine that acts or omissions by members of a class of persons to whom subsection 27(1) 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. Subsection 27(1) applies to a person performing a function or duty in relation to, among things, the defence, security or international relations of Australia, or a foreign country whose naval, military or air force is acting in co-operation with the Defence Force of Australia.

Under subparagraph 27(1)(be)(ii) of the Act, the ACMA may 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.

Subsection 33(3) of the AIA relevantly provides that, where an Act confers a power to make, grant or issue an instrument of a legislative character, 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 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.

Under subsection 167(1) of the Act, the ACMA may, by notifiable instrument, impose an interim ban on equipment of a specified kind. Under subsection 172(1) of the Act, the ACMA may, by legislative instrument, impose a permanent ban on equipment of a specified kind.

Interim and permanent bans on equipment principally manage the risks associated with the operation and supply of equipment that is, in broad terms, designed, or is likely, to cause interference to radiocommunications. The imposition of a ban on such equipment is generally intended to protect consumers, businesses, government agencies and radiocommunications licensees from the potential interference to radiocommunications that the equipment subject to a ban can cause.

Section 170 of the Act imposes civil penalties in relation to the operation or supply of, or an offer to supply, equipment of a particular kind where an interim ban on equipment of that kind is in force. The maximum civil penalty payable is 200 penalty units, or \$55,000 on the current value of a penalty unit.

Sections 175 and 176 of the Act impose criminal offences and civil penalties in relation to the operation or supply of, or an offer to supply, equipment, or the possession of equipment for the purpose of operating or supplying it, where a permanent ban on equipment of that kind is in force. An

offence is subject to imprisonment for a maximum of 2 years, or a maximum fine of 1000 penalty units (\$275,000 on the current value of a penalty unit), or both. The maximum civil penalty payable is 1000 penalty units (\$275,000).

Where the ACMA has imposed a permanent ban on equipment, subregulation 4(2) of 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. 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).

The ACMA has made the *Radiocommunications (Jamming Equipment) Permanent Ban 2023 (the Permanent Ban)* under subsection 172(1) and subsection 174 of the Act. The Permanent Ban revokes the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011 (the PMTS Jamming Devices Prohibition)* and the *Radiocommunications (Prohibited Device) (RNSS Jamming Devices) Declaration 2014 (the RNSS Jamming Devices Prohibition)*, which were due to sunset on 1 April 2023, and 1 April 2025, respectively. The PMTS Jamming Devices Prohibition and the RNSS Jamming Devices Prohibition were made under repealed section 190 of the Act. Item 49 of Schedule 4 to the *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020 (the Modernisation Act)* provides that certain instruments made under repealed section 190 of the Act continue to have effect as if they had been made under subsection 172(1) of the Act.

The Permanent Ban, among other things, replaces the effect of the PMTS Jamming Devices Prohibition and the RNSS Jamming Devices Prohibition and bans public mobile telecommunications service (PMTS) jamming equipment and radionavigation-satellite service (RNSS) jamming equipment.

The ACMA has made the *Radiocommunications (Exemption – Corrective Services NSW) Determination 2021 (the CSNSW Exemption)*, which provides that Corrective Services NSW (CSNSW) is a body that, relevantly, ‘performs functions related to the investigation, prevention or prosecution of serious crime’ (subparagraph 27(1)(be)(i)). The CSNSW Exemption also 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 and supply of what the PMTS Jamming Devices Prohibition defined as a PMTS jamming device.

The ACMA has also made the *Radiocommunications (PMTS Jamming Devices – Visiting Forces and Suppliers) Exemption Determination 2011 (the PMTS Exemption Determination)* and the *Radiocommunications (Prohibited Device) (RNSS Jamming Devices) Exemption Determination 2014 (the RNSS Exemption Determination)*. The PMTS Exemption Determination exempts certain persons performing a function or duty in relation to the defence, security or international relations of Australia or a foreign country whose naval, military or air force is acting in co-operation with the Defence Force, from the operation of Parts 3.1, 4.1 and 4.2 of the Act, in relation to what the PMTS Jamming Devices Prohibition defined as a PMTS jamming device. The RNSS Exemption exempts the Defence Force and the Department of Defence, as well as members thereof and persons having functions or duties in relation to those bodies, from specified sections and Parts of the Act, in relation to what the RNSS Jamming Devices Prohibition defined as a RNSS jamming device.

The purpose of the instrument is to amend the CSNSW Exemption, the PMTS Exemption Determination and the RNSS Exemption Determination, to replace references in those instruments to a PMTS jamming device and an RNSS jamming device with references to the definitions of PMTS jamming equipment and RNSS jamming equipment in the Permanent Ban.

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**). The CSNSW Exemption Determination, the PMTS Exemption Determination and the RNSS Exemption Determination are subject to the sunset provisions of the LA.

### **Documents incorporated by reference**

Section 314A of the Act provides that an instrument under the Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matters contained in any Act or any other instrument or writing as in force or existing at a particular time or from time to time.

The instrument amends each of the CSNSW Exemption Determination, the PMTS Exemption Determination and the RNSS Exemption Determination to incorporate the Permanent Ban, or any instrument that replaces the Permanent Ban, by reference, as in force from time to time.

### **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 Australian Federal Police; Boeing; the 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; Pivotel; QinetiQ; Telstra; TPG Telecom and Transport for NSW.

The ACMA received 8 submissions that offered commentary on the draft instruments included in the consultation.

None of the submissions offered views on the instrument.

### **Regulatory impact assessment**

The Office of Impact Analysis (**OIA**) has conducted a preliminary assessment on the draft instruments that formed the basis of the Permanent Ban, based on information provided by the ACMA. The OIA advised that a Regulatory Impact Statement was not required because the proposed regulatory changes were minor or machinery in nature (OIA reference numbers: OBPR22-02525, OBPR22-02526 and OBPR22-02527).

A preliminary assessment of the instrument was not conducted by OIA, because it facilitates minor changes related to those other instruments.

## **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 below has been prepared to meet that requirement.

### ***Overview of the instrument***

The instrument amends the CSNSW Exemption, the PMTS Exemption Determination, and the RNSS Exemption Determination to remove outdated definitions of PMTS jamming devices and RNSS jamming devices, and replaces them with new definitions based on the definitions of PMTS jamming equipment and RNSS jamming equipment, as provided for in the Permanent Ban.

### ***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 does not engage any of those rights or freedoms.

### ***Conclusion***

The instrument is compatible with human rights as it does not raise any human rights issues.

## Notes to the *Radiocommunications (Exemptions) Amendment Determination 2023 (No. 1)*

### Section 1 Name

Section 1 provides for the instrument to be cited as the *Radiocommunications (Exemptions) Amendment Determination 2023 (No.1)*.

### Section 2 Commencement

Section 2 provides that the instrument commences at the later of either the start of the day after the day it is registered on the Federal Register of Legislation, or the commencement of the *Radiocommunications (Jamming Equipment) Permanent Ban 2023*.

The instrument forms part of an integrated package of laws designed to operate together to impose a permanent ban on certain kinds of equipment, and to exempt certain people from the effect of those bans. The Permanent Ban, which bans the equipment, will commence on the day after it is registered. The instrument, which makes consequential changes as a result of the Permanent Ban coming into force, cannot come into force before the Permanent Ban does. The registration and commencement of the Permanent Ban will be made public on the Federal Register of Legislation. Information about the Permanent Ban will also be published on the ACMA's website, in accordance with subsection 172(3) of the Act.

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 Act.

### Section 4 Amendment – Corrective Services NSW Exemption Determination

Section 4 provides that the instrument specified in Schedule 1 to the instrument is varied as set out in that Schedule.

### Section 5 Amendment – PMTS Exemption Determination

Section 5 provides that the instrument specified in Schedule 2 to the instrument is varied as set out in that Schedule.

### Section 6 Amendment – RNSS Exemption Determination

Section 6 provides that the instrument specified in Schedule 3 to the instrument is varied as set out in that Schedule.

### Schedule 1 Amendment – Corrective Services NSW Exemption Determination

#### Item 1 Subsection 6(1), definition of *PMTS jamming device*

The item in Schedule 1 amends the CSNSW Exemption Determination to replace the definition of a PMTS jamming device, and to include a new definition for PMTS jamming equipment, referencing the definition in the Permanent Ban or any instrument that replaces the Permanent Ban.

### Schedule 2 Amendment – PMTS Exemption Determination

#### Item 1 Section 4, definition of *PMTS jamming device*

The item in Schedule 1 amends the PMTS Exemption Determination to replace the definition of a PMTS jamming device, and to include a new definition for PMTS jamming equipment, referencing the definition in the Permanent Ban or any instrument that replaces the Permanent Ban.

**Schedule 3      Amendment – RNSS Exemption Determination**

**Item 1            Section 3, definition of *RNSS jamming device***

The item in Schedule 1 amends the RNSS Exemption Determination to replace the definition of an RNSS jamming device, and to include a new definition for RNSS jamming equipment, referencing the definition in the Permanent Ban or any instrument that replaces the Permanent Ban.