

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Exemption) Determination 2024

Authority

The Australian Communications and Media Authority (the **ACMA**) has made the *Radiocommunications (Exemption) Determination 2024* (the **instrument**) under subsection 302(2) of the *Radiocommunications Act* (the **Act**).

Under that subsection, the ACMA may, by legislative instrument, determine that one or more specified acts or one or more specified persons are exempt from one or more specified compliance provisions relating to equipment that is subject to a permanent ban or an interim ban, the unlicensed operation of radiocommunications devices, and the unlawful possession of radiocommunications devices.

Subsection 302(5) of the Act provides that a determination made under subsection 302(2) may confer a power to make a decision of an administrative character on the ACMA.

Purpose and operation of the instrument

The purpose of the instrument is to replace the *Radiocommunications (Exemption) Determination 2021* (the **Exemption Determination 2021**).

The Exemption Determination 2021 established a framework to exempt specified acts from provisions in the Act that prohibit the operation or possession of a radiocommunications device unless authorised by a licence, where the radiocommunications device is subject to a permanent ban, and that prohibit the operation, possession, supply of, or offer to supply equipment that is subject to such a ban.

The ACMA made the Exemption Determination 2021 given recent technological advancements, public safety and security concerns which had driven interest in equipment subject to a permanent ban under section 172 of the Act. Prior to making the Exemption Determination 2021, stakeholders from Australia's defence industry, radiocommunications and technology sectors, and government agencies had approached the ACMA for assistance in realising domestic research, development, trialling, and manufacturing opportunities involving equipment subject to a permanent ban. Reforms made by the *Radiocommunications Legislation Amendment (Reform and Modernisation Act) 2020* made it possible for the ACMA to make instruments allowing such stakeholders to operate, possess, supply, or offer to supply such equipment.

The Exemption Determination 2021 included a self-repeal provision to facilitate the review of its operation after 3 years. The instrument comes into force on the same day the Exemption Determination 2021 self-repealed, so that the framework established by the Exemption Determination 2021 is preserved. The instrument largely replicates the Exemption Determination 2021 but includes some minor amendments. These amendments are:

- capturing 'screened room' operation in a broader definition for 'shielded enclosure';
- allowing for a 5-year self-repeal date;
- transitional measures to allow applications to have a named person exemption made, that were submitted prior to the instrument commencing, to be assessed and a named person exemption made (if applicable) under the instrument.

Unlicensed equipment under the Act

Under section 46 of the Act, it is an offence, and subject to a civil penalty, to operate a radiocommunications device otherwise than as authorised by a spectrum licence, an apparatus licence or a class licence. The Act prescribes the following maximum penalties for the offence:

- if the radiocommunications device is a radiocommunications transmitter, and the offender is an individual – imprisonment for 2 years;
- if the radiocommunications device is a radiocommunications transmitter, and the offender is not an individual – 1,500 penalty units (which is \$469,500 based on the current penalty unit amount of \$313);
- If the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$6,260).

The Act prescribes the following maximum civil penalties:

- if the radiocommunications device is a radiocommunications transmitter – 300 penalty units (\$93,900);
- if the radiocommunications device is not a radiocommunications transmitter – 20 penalty units (\$6,260).

Under section 47 of the Act, it is an offence, and subject to a civil penalty, to possess a radiocommunications device for the purpose of operating the device otherwise than as authorised by a spectrum licence, an apparatus licence or a class licence. The Act prescribes the same penalties for this offence and civil penalty contravention as those for section 46.

Banned equipment under 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.

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. Imposing a ban on such equipment is generally intended to protect consumers, businesses, government agencies and radiocommunications licensees from potential interference to radiocommunications that the equipment can cause. Equipment subject to a permanent ban is commonly called a radiocommunications ‘jamming device’ or a ‘jammer’.

Section 170 of the Act is a civil penalty provision 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 (\$62,600).

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 1,000 penalty units (\$313,000) or both. The maximum civil penalty payable is 1,000 penalty units (\$313,000).

The ACMA has made the *Radiocommunications (Jamming Equipment) Permanent Ban 2023* (the **permanent ban**). The permanent ban imposes bans on three types of jamming equipment. Equipment subject to the permanent ban is capable of operating on, and causing interference to: public mobile telecommunications services (**PMTS**), more commonly known as mobile or cell phone services; the

radionavigation-satellite service (**RNSS**), more commonly known as the global positioning system, or GPS; and radio local area networks (**RLAN**) and remotely piloted aircraft (**RPAS**), more commonly known as Wi-Fi and drones. These radiocommunications services are relied upon by a wide range of users including businesses, consumers, and government agencies for day-to-day activities, and commercial, safety and security applications. For example, PMTS services are critical for enabling emergency calls, and the RNSS facilitates navigation services for the public, businesses, and safety sectors. Intentional or unintentional interference to these radiocommunications services can lead to inconveniences or major disruptions.

At the time of making the instrument, the ACMA had not made any interim bans under subsection 167(1) of the Act.

Exemptions under the Act

An exemption made under subsection 302(2) of the Act may exempt specified acts or specified persons from one or more specified compliance provisions. The compliance provisions from which a person or act may be exempt are listed in subsection 302(1) of the Act:

- subsections 46(1) and (3), relating to the operation of a radiocommunications device otherwise than as authorised by a licence.
- subsections 47(1) and (3), relating to the possession of a radiocommunications device, for the purpose of operating it otherwise than as authorised by a licence.
- subsections 170(1) to (3), relating to the supply, offer to supply, or operation of, equipment where that kind of equipment is covered by an interim ban.
- subsections 175(1) to (4) and subsections 176(1) to (4), relating to the supply, offer to supply, operation, or possession of equipment where that kind of equipment is covered by a permanent ban.

The Explanatory Memorandum to the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020* (the **Explanatory Memorandum**) states that exemptions made under section 302 “are designed to help promote innovation and industry development opportunities within Australia”. The instrument will continue the work of the Exemption Determination 2021 in promoting such opportunities by exempting certain acts from specified compliance provisions. The instrument will have the practical effect of enabling persons to carry out research and development, and manufacturing activities that lead to the creation, or rely on the use, of equipment subject to one or more permanent bans.

Public interest considerations

Under subsection 302(4) of the Act, the ACMA must not determine an exemption under subsection 302(2) unless the ACMA is satisfied that the exemption is in the public interest, or the exemption is of a kind specified in the legislative rules made by the Minister under section 313B of the Act (the **legislative rules**). At the time of making the instrument, the Minister had not specified any kind of exemptions under the legislative rules.

In considering whether it is satisfied that the instrument is in the public interest, the ACMA has had regard to the object in section 3 of the Act. That object is to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that, among other things, facilitates the use of the spectrum for commercial purposes, as well as defence purposes, national security purposes and other non-commercial purposes (including public safety and community purposes).

The ACMA considers that it is in the public interest to preserve the framework that was established by the Exemption Determination 2021 for the purpose of:

- strengthening Australian industrial, scientific, technology and manufacturing capabilities;
- creating jobs and supporting domestic businesses;
- developing technologies and systems that have clear commercial, safety, security, or strategic applications; and
- supporting Australian Government policy.

The instrument assists these goals by facilitating the potential Australian manufacture and supply of equipment subject to a permanent ban. However, any such benefits must be balanced against the significant risk of interference posed by the operation of equipment subject to a permanent ban.

The ACMA considers that the instrument is in the public interest as it imposes several conditions on the operation, possession, or supply of, or an offer to supply, such equipment. Any act done otherwise than in accordance with the conditions in the instrument may be an offence, or subject to a civil penalty, and incur the penalties mentioned above.

Importantly, it is a condition that a person must only do a specified act if that person is named in a notifiable instrument made under the subclause 1(1) of Schedule 1 to the instrument (**Schedule 1**) and, at the time the person does the act, the notifiable instrument is in force. This allows the ACMA to exercise a degree of oversight of the persons who manufacture and supply equipment subject to a permanent ban. There are several other conditions designed to minimise the risk of interference and the inappropriate operation of equipment. These are discussed in **Attachment A**.

The instrument does not exempt acts in relation to equipment subject to an interim ban. Due to the short duration of an interim ban, and the fact that no civil penalty applies in relation to the possession of equipment subject to an interim ban, the ACMA considered that there was no need to provide for an exemption in relation to interim bans at this time.

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

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

The instrument is subject to the sunset provisions of the LA; however, section 3 of the instrument provides for its repeal after five years, to facilitate earlier review by the ACMA of its operation.

Documents incorporated by reference

Subsection 314A(1) 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 as in force at a particular time, or from time to time. Subsection 314A(2) 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) matter contained in any other instrument or writing as in force or existing at a particular time or from time to time.

The instrument incorporates the following Acts and legislative instruments by reference, as in force from time to time, or otherwise refers to them:

- the Act;
- the *Acts Interpretation Act 1901*;
- the *Customs (Prohibited Exports) Regulations 1958*;

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- the *Defence and Strategic Goods List 2021*;
- the LA.

Each of these Acts and legislative instruments is available, free of charge, from the Federal Register of Legislation (www.legislation.gov.au).

The instrument also incorporates by reference, the *Radiation Protection Standard for Limiting Exposure to Radiofrequency Fields – 100 kHz to 300 GHz (2021)* (the **ARPANSA Standard**) and any standard published as a replacement of that standard, as existing from time to time. The ARPANSA Standard is published by the Australian Radiation Protection and Nuclear Safety Agency, and is available, free of charge, at www.arpansa.gov.au.

Consultation

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

The instrument replaces the Exemption Determination 2021 with minor amendments. Notably, the term ‘screened room’ has been replaced with ‘shielded enclosure’, as this more accurately encapsulates the requirements of operating a banned device.

The ACMA invited comments on the proposal to remake the Exemption Determination 2021 by publishing a draft of the instrument and an accompanying consultation paper on its website. The ACMA also directly notified the persons named in notifiable instruments made under the Exemption Determination 2021, and relevant government and industry stakeholders through an e-bulletin. The public consultation process began on 13 May 2024 and ended on 11 June 2024.

The ACMA received two submissions in response to the consultation process. Both submissions expressed support for the proposal to make the instrument.

Regulatory impact assessment

A preliminary assessment of the proposal to make the instrument was conducted by the Office of Impact Analysis (**OIA**), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OIA advised that a RIS would not be required under the Australian Government’s Policy Impact Analysis Framework. The assessment noted that the minor amendments to the Exemption Determination 2021 within the instrument did not place any additional regulatory burden on stakeholders. The OIA reference number is OIA24-07489.

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) Determination 2024*

Section 1 Name

This section provides for the instrument to be cited as the *Radiocommunications (Exemption) Determination 2024*.

Section 2 Commencement

This section provides for the instrument to commence at the start of 28 August 2024 or at the start of the day after the day it is registered on the Federal Register of Legislation, whichever is later.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the instrument, namely subsection 302(2) of the Act.

Section 4 Repeal of this instrument

This section provides that the instrument will be repealed after five years. This is to facilitate review of its operation by that time.

Section 5 Definitions

This section defines several key terms used throughout the instrument.

Several other expressions used in the instrument are defined in the Act.

Section 6 References to other instruments

This section 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 existing from time to time.

Section 7 Exempt acts

This section provides that, subject to the conditions set out in sections 8 to 14, each act specified in an item of the table in the section is exempt from the compliance provisions specified in the corresponding item of the table.

Item 1 of the table provides that possession of a banned device is exempt from the compliance provisions in subsections 47(1) and 47(3) of the Act (concerning the offence of, and civil penalty for, unlawful possession of radiocommunications devices, respectively), and subsections 175(4) and 176(4) of the Act (concerning the offence of, and civil penalty for, possession of a banned device, respectively).

Item 2 of the table provides that operation of a banned device is exempt from the compliance provisions in subsections 46(1) and 46(3) of the Act (concerning the offence of, and civil penalty for,

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unlicensed operation of radiocommunications devices, respectively), and subsections 175(3) and 176(3) of the Act (concerning the offence of, and civil penalty for, operation of a banned device, respectively).

Item 3 of the table provides that supply of a banned device is exempt from the compliance provisions in subsections 175(1) and 176(1) of the Act (concerning the offence of, and civil penalty for, supply of a banned device respectively).

Item 4 of the table provides that offering to supply a banned device is exempt from the compliance provisions in subsections 175(2) and 176(2) of the Act (concerning the offence of, and civil penalty for, offering to supply a banned device, respectively).

Section 8 Condition of exemption – compliance with ARPANSA Standard

Subsection 8(1) provides that, in order for the acts of possession or supply of a banned device, or offering to supply a banned device, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only do the act if the electromagnetic energy that could be emitted by the device does not exceed the general public exposure limits specified in the ARPANSA Standard in a place that is accessible by the public.

Subsection 8(2) provides that, in order for the act of operation of a banned device, or a group of banned devices, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only operate the device, or the group of devices, if the electromagnetic energy that is emitted by the device, or by the group of devices, does not exceed the general public exposure limits specified in the ARPANSA Standard in a place that is accessible by the public.

Section 9 Condition of exemption – person named in notifiable instrument

This section provides that, in order for any act specified in the table in section 7 to be exempt from the specified compliance provisions in that table, a person must only do the act if the person is named in a notifiable instrument made under subclause 1(1) of Schedule 1 and, at the time the person does the act, the notifiable instrument must be in force.

Section 10 Condition of exemption – restriction on operation of banned device

This section provides that, in order for the act of operating a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only operate the device in accordance with at least one of the following:

- all emissions from the device are dissipated into a dummy load;
- the device is operated in a shielded enclosure, and the signal level of the radio emissions caused by the device at each point of the external surface of the enclosure is not greater than the mean level of ambient radiofrequency noise in the place the enclosure is located;
- the device is operated in accordance with a written permission given by the ACMA to the person under subsection 193(1) of the Act and, at the time the device is operated, the written permission was registered as a notifiable instrument on the Federal Register of Legislation and had not been revoked.

Section 11 Condition of exemption – restriction on supply of banned device

This section provides that, for the act of supply of a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only supply the device to

an entity listed in this section. Other than persons outside Australia, the ACMA and persons who are named in a notifiable instrument made under subclause 1(1) of Schedule 1, the entities listed all relate to Australia's defence or national security, emergency services or law enforcement.

Section 12 Condition of exemption – record-keeping requirements

This section provides that for the act of possession, operation, or supply of a banned device, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only do the act if the person complies with the applicable record-keeping requirements set out in the section. Different record-keeping requirements relate to different acts. For example, if the act is the operation of a banned device, the person must only do the act if the person keeps a written record of certain particulars relating to the operation of the device and the prevention or reduction of interference to radiocommunications in that regard; whereas if the act is possession of a banned device, the person must keep a written record of certain particulars relating to the device when the person first came into possession of the device, and when the person ceased to be in possession of it.

Section 13 Condition of exemption – retention of records

This section provides that, for the act of possession, operation, or supply of a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person who is required to create a record under section 12 must retain the record for at least 5 years.

If a person who is required to comply with sections 12 and 13 is an 'organisation' within the meaning of the *Privacy Act 1988*, and any of the records to be created or retained contain personal information, then the person may have to comply with the Australian Privacy Principles in the handling of that information. A person will not be an 'organisation' under the *Privacy Act 1988* if, among other things, the person is a 'small business operator' within the meaning of that Act. Section 6D of the *Privacy Act 1988* sets out how to work out whether a person is a small business operator.

There may be some cases where persons who are required to comply with sections 12 and 13 are not an 'organisation' under the *Privacy Act 1988*. Where this is the case, the Office of the Australian Information Commissioner has issued general advice to the effect that, while such persons are not obliged to comply with the *Privacy Act 1988*, they should, as a matter of best practice, protect any personal information they hold, and should consider whether to opt-in to the *Privacy Act 1988*, given the benefits that may result. More information can be obtained from the website of the Office of the Australian Information Commissioner at www.oaic.gov.au.

Section 14 Condition of exemption – providing records to the ACMA or an inspector

This section provides that, in order for the act of possession, operation or supply of a banned device to be exempt from the compliance provisions specified in the table in section 7 (as relevant), a person who is required to create a record under section 12 must provide a copy of a record created to the ACMA or an inspector if the ACMA or the inspector so requests, in writing.

The person must provide the copy of the record created within such a period, being not less than 2 days, as is specified in the written request.

Schedule 1–Named persons

Clause 1 ACMA may make notifiable instrument

Subclause 1(1) provides that the ACMA may, by notifiable instrument, name a person for the purpose of section 9 and paragraph 11(m).

Subclause 1(2) provides that the ACMA must not make a notifiable instrument under subclause 1(1), unless it is satisfied of the matters specified in this subclause. The ACMA must be satisfied that making a notifiable instrument is in the public interest, or that a notifiable instrument is consistent with the legislative rules. The ACMA must also be satisfied that naming a person in a notifiable instrument would not lead to a significant risk of a contravention of a condition of an exemption under any item of the table in section 7.

Subclause 1(3) provides that the ACMA may make a notifiable instrument under subclause 1(1) regardless of whether a person has made an application under clause 3.

Subclause 1(4) provides that if, before making an instrument under subclause 1(1), the ACMA has reason to believe that a person intends to supply to a person outside Australia, a banned device that is included in the defence and strategic goods list, the ACMA, in deciding whether to make the instrument, may have regard to certain matters specified in the subclause. Specifically, the ACMA may have regard to whether the person has made an application for permission to export goods in accordance with regulation 13EB of the *Customs (Prohibited Exports) Regulations 1958*, and whether the Defence Minister has granted permission under regulation 13E of those regulations.

Subclause 1(5) provides that the defence and strategic goods list has the meaning given by subregulation 2(1) of the *Customs (Prohibited Exports) Regulations 1958*.

Clause 2 ACMA may revoke notifiable instrument

Subclause 2(1) provides that the ACMA may revoke a notifiable instrument made under subclause 1(1).

Without limiting subclause 2(1), subclause 2(2) provides the circumstances where the ACMA must revoke a notifiable instrument. The ACMA must revoke a notifiable instrument where it is satisfied that the instrument is not, or has ceased to be, in the public interest, or where the instrument is not, or has ceased to be, consistent with the legislative rules.

Without limiting subclause 2(2), subclause 2(3) provides that the ACMA may be satisfied that a notifiable instrument is not, or has ceased to be, in the public interest, if the person named in the instrument has contravened a condition of an exemption under any item of the table in section 7, other than the condition in section 9.

Before revoking a notifiable instrument, the ACMA must consult with the person named in the instrument, unless the ACMA is satisfied that such consultation is not in the public interest. Consultation may not be in the public interest, for example, if the ACMA becomes aware that a banned device being used by a person named in a notifiable instrument is causing harmful interference to radiocommunications used in relation to emergency services.

The ACMA must give the person named in the notifiable instrument a written notice of the decision and the reasons for the decision and of the person's right to request a reconsideration of the decision under clause 4.

Clause 3 Application that notifiable instrument be made

Subclause 3(1) provides that a person may apply, in writing, for the ACMA to make a notifiable instrument under subclause 1(1) naming the person for the purposes of section 9 and paragraph 11(m).

Subclause 3(2) provides that an application must be in a form approved by the ACMA (if any); and made in a manner approved by the ACMA (if any).

Subclause 3(3) provides that, if a person makes an application, the ACMA must decide whether to grant the application within 90 days after it is made, or such longer period as agreed between the ACMA and the applicant.

Subclause 3(4) provides that the ACMA must, within 14 days after the decision on the application is made, give the applicant a written notice of the decision; and if the decision is not to grant the application, the reasons for the decision and the applicant's right to request reconsideration of the decision under clause 4.

Subclause 3(5) provides that if the decision is to grant the application, the ACMA must, within 14 days, make an instrument under subclause 1(1) naming the applicant.

Clause 4 Reconsideration and external review of decisions

As at the date of the instrument, the *Administrative Review Tribunal Act 2024* had not commenced. Item 13 of Schedule 16 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* provides that if, after commencement of the *Administrative Review Tribunal Act 2024*, another Act refers to the Administrative Appeals Tribunal (the AAT), that reference is taken to be a reference to the Administrative Review Tribunal.

Clause 4 provides for internal reconsideration, and review by the AAT, of a decision under subclause 2(1) to revoke a notifiable instrument made under subclause 1(1) and a decision under subclause 3(3) not to grant an application to make a notifiable instrument under subclause 1(1).

Subclause 4(1) defines key terms used in clause 4.

Subclause 4(2) provides that an affected person in relation to a relevant decision may request the ACMA to reconsider the decision. An affected person in relation to a decision not to grant an application to make a notifiable instrument under subclause 1(1) is the applicant. An affected person in relation to a decision to revoke a notifiable instrument made under subclause 1(1) is the person named in the instrument.

Subclause 4(3) provides that a request under subclause 4(2) must be made in writing, set out the reasons for the request and be given to the ACMA within 30 days after the affected person is notified of the relevant decision.

Subclause 4(4) provides that the ACMA must, within 90 days after the request is received, reconsider the relevant decision, and affirm it or make a fresh decision to the effect that the ACMA must, within 14 days after the decision is made, make a notifiable instrument under subclause 1(1) naming the affected person for the purposes of section 9 and paragraph 11(m).

Subclause 4(5) provides that the ACMA must, within 14 days after the reconsidered decision is made, give the affected person written notice of the reconsidered decision; and if the reconsidered decision affirms the relevant decision, the reasons for the reconsidered decision and the affected person's right to have the reconsidered decision reviewed under subclause 4(6).

Subclause 4(6) provides that the affected person may apply to the AAT for review of the reconsidered decision.

Clause 5 Transitional provisions

Clause 5 (1) provides that should any applications under clause 3 of Schedule 1 to the Exemption Determination 2021 be submitted but not determined prior to the commencement of the instrument, they are taken to have been made under the instrument.

Subclause 5(2) provides that should any applications for reconsideration of a decision under clause 4 of Schedule 1 to the Exemption Determination 2021 be submitted but not reconsidered prior to the commencement of the instrument, the application is taken to be an application for reconsideration of the relevant decision for the purposes of clause 4 of Schedule 1 to the instrument.

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

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Overview of the instrument

The instrument is made under section 302(2) of the *Radiocommunications Act 1992* (the **Act**).

The purpose of the instrument is to preserve the framework that was established by the *Radiocommunications (Exemption) Determination 2021* (the **Exemption Determination 2021**). The Exemption Determination 2021 exempted specified acts from the provisions of the Act that prohibit the operation or possession of radiocommunications devices otherwise than as authorised by a licence, and that prohibit the operation, possession or supply of, or offers to supply, equipment subject to a permanent ban. Three kinds of equipment are subject to the *Radiocommunications (Jamming Equipment) Permanent Ban 2023*: public mobile telecommunications service (**PMTS**) jamming devices, radionavigation satellite service (**RNSS**) jamming devices and radio land area network (**RLAN**) and remotely piloted aircraft systems (**RPAS**) jamming equipment.

The exemption in the instrument is subject to conditions. These conditions are intended to ensure that persons relying on the instrument do not inadvertently use banned devices in a manner that might cause interference to radiocommunications. To ensure this, the instrument limits the operation of banned devices to at least one of the following scenarios:

- all radio emissions from the device are dissipated into a dummy load;
- the device is operated in a shielded enclosure, and the signal level of the radio emissions caused by the device at each point of the external surface of the enclosure is not greater than the mean level of ambient radiofrequency noise in the place the enclosure is located;
- the device is operated in accordance with a written permission given by the ACMA to a person under subsection 193(1) of the Act and, at the time the device is operated, the written permission was registered as a notifiable instrument on the Federal Register of Legislation and had not been revoked.

A person cannot perform an exempt act under the instrument unless they are named in a notifiable instrument made under subclause 1(1) of Schedule 1 to the instrument. A person cannot perform an exempt act under the instrument unless they keep records required by the instrument.

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.

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The right to freedom of expression includes the right to seek, receive, and impart information through any media of one's choice. Article 19 provides that the right to freedom of expression may be limited by certain restrictions, including for the protection of national security and public order.

Subject to commercial agreements with providers, and reasonable expectations of service quality and connectivity, the right to communicate using any media of one's choice conventionally extends to the right to use wireless communication technologies.

Irresponsible operation of banned devices has the potential to interfere with, disturb or disrupt the radiofrequency bands used for wireless communication in Australia, thereby limiting, or compromising, the public's ability to use such services. To eliminate this risk, conditions in the instrument largely limit the operation of banned devices to use with dummy loads or in shielded enclosures, which are widely accepted strategies for managing interference.

The instrument may enable limited operational use of banned devices. To operate banned devices in this manner, a person will require further written permission from the ACMA under subsection 193(1) of the Act. This kind of written permission is restricted to authorising interference to a very limited selection of radiocommunications—namely those carried on by, or on behalf of, certain persons, including the Australian Federal Police, or a state or territory police force.

Such limited operational use of banned devices is intended to be kept to a minimum, and practical steps can be taken by operators of banned devices and radiocommunications licensees to minimise or eliminate any adverse effects associated with incidental interference from banned devices. The ACMA may also consult with radiocommunications licensees before giving a written permission to a person under subsection 193(1). This type of engagement is consistent with the ACMA's general licensing and interference management activities.

Operation of banned devices in this manner is consistent with Article 19. Considering the strict conditions to which the instrument is subject, the activities which are permitted by the instrument are unlikely to interfere with the rights expressed in Article 19. Where such activities might interfere with the rights expressed in Article 19, they will occur in accordance with a written permission from the ACMA under subsection 193(1) of the Act. Given the circumstances in which such a permission can be given, such interference would be reasonable, necessary, and proportionate to activities intended to support lawful enhancements to Australia's national security and public safety protections.

Conclusion

The instrument is compatible with human rights because potential limitations on the right of freedom of expression are limited in a manner which is reasonable, necessary, and proportionate to the purpose of enhancing public safety and national security protections.