

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Body Scanning – Aviation Security) Class Licence 2018

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Body Scanning – Aviation Security) Class Licence 2018* (**the instrument**) under section 132 of the *Radiocommunications Act 1992* (**the Act**).

Under section 132, the ACMA may, by legislative instrument, issue class licences which authorise any person to operate a radiocommunication device of a specified kind, or for a specified purpose, or of a specified kind for a specified purpose. In accordance with section 133 of the Act, the ACMA may include in a class licence such conditions as it thinks fit.

Under section 137 of the Act, the ACMA must not issue a class licence that is inconsistent with the *Australian Radiofrequency Spectrum Plan 2017* (**spectrum plan**) or a frequency band plan. The instrument is consistent with the spectrum band plan, and no frequency band plans apply in relation to the spectrum covered by the instrument.

Under section 138 of the Act, the ACMA must not issue a class licence that authorises the operation of radiocommunications devices at frequencies that are within a part of the spectrum that is designated under section 36 of the Act or specified in a declaration under section 153B of the Act, without following a particular process. Section 138 does not apply to the parts of the spectrum specified in the instrument.

Purpose and operation of the instrument

The purpose of the instrument is to authorise the use and possession of body scanners at Australian airports, for security screening processes. Sections 46 and 47 (subject to section 49) of the Act respectively make it an offence to operate, or possess for the purpose of operation, a radiocommunications device otherwise than as authorised by a spectrum licence, an apparatus licence or a class licence. Body scanners are radiocommunications devices within the meaning of section 7 of the Act.

What is the purpose of body scanners?

A body scanner is a security screening device that uses millimetre-wave radiofrequency technology to detect metallic and non-metallic items and substances on a person. Body scanners are currently used for aviation security purposes in some Australian international airports and have been operated under apparatus licences.

Where is the operation of body scanners authorised?

Under the instrument, the possession and operation of body scanners will be authorised at those Australian domestic airports which are declared, by notice published in the *Gazette*, to be security controlled airports (**security controlled airports**) by the Secretary of the Department of Home Affairs, under section 28 of the *Aviation Transport Security Act 2004* (**ATS Act**). Gazette notices of declarations of security controlled airports are published on the Federal Register of Legislation.

Who can operate a body scanner?

Under the instrument, a body scanner may be operated by the following **authorised persons**:

- (a) screening officers authorised under the ATS Act;
- (b) screening authorities within the meaning of the ATS Act;

- (c) registered training organisations under the *National Vocational Education and Training Regulator Act 2011* and their employees and contractors.

Training and qualification requirements for screening officers are prescribed by the *Aviation Transport Regulations 2005*. Under the instrument, registered training organisations providing training for current or prospective screening officers as part of a VET course are authorised to operate a body scanner at a security controlled airport, provided the registered training organisation has a written agreement with a screening authority that requires the organisation to provide that training.

Operation of body scanners

The authorisation given by the instrument to operate a body scanner is dependent on the operation of the body scanner meeting the conditions set out in sections 7 and 8 of the instrument. 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**).

Documents incorporated by reference

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

- the Act;
- the ATS Act;
- *National Vocational Education and Training Regulator Act 2011*.

The Commonwealth legislation listed above can be found on the Federal Register of Legislation (<http://www.legislation.gov.au/>).

In accordance with section 314A of the Act, the instrument also incorporates by reference the *Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3 kHz to 300 GHz (ARPANSA Standard)*, published by the Australian Radiation Protection and Nuclear Safety Agency, as in existence from time to time. The ARPANSA Standard is freely available from the Australian Radiation Protection and Nuclear Safety Agency website: <http://www.arpansa.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.

On 18 April 2018, the ACMA published a notice and consultation paper on its website, inviting public comment on a draft version of the instrument until 31 May 2018.

The ACMA conferred closely with the Australian Mobile Telecommunications Association (AMTA), the Department of Home Affairs, Telstra and Optus on concerns about co-existence between body scanners and 5G services. The ACMA considered that the instrument did not increase the risk of interference posed by body scanners. Under the instrument, body scanners can only be deployed at security controlled airports, where mitigation measures and practical site management tactics can manage the low risk of interference.

AMTA also raised a number of questions about the drafting of conditions related to the total radiated power of body scanners. Following further consultation with AMTA and body scanner manufacturers, the ACMA clarified the maximum permitted radiated power.

Regulatory impact assessment

A preliminary assessment of the proposal to make the instrument was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required because the instrument was expected to have a minor regulatory impact on businesses, community organisations or individuals (OBPR reference number 23446).

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

This instrument authorises a screening authority or a screening officer to operate a body scanner for the purpose of carrying out screening of persons at a security controlled airport and authorises a registered training organisation or a person employed by or contracted to a registered training organisation to operate a body scanner for the purpose of training screening officers. Authorised operation of body scanners is subject to technical and operational conditions contained in the licence.

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.

The use of body scanners may raise human rights issues relating to privacy, and this is dealt with by section 44 of the ATS Act. Subsection 44(3B) of the ATS Act provides that if body scanning equipment is to be used for the screening of a person, and the equipment produces an image of the person, the image must only be a generic body image that is gender-neutral and from which the person cannot be identified. Subsection 44(3C) provides that if body scanning equipment is to be used for the screening of a person, the equipment must not store or transmit an image of the person that is produced by the equipment or personal information about the person. The scope of the instrument is confined to authorising the operation of radiocommunications transmitters as part of the use of body scanners, subject to technical and operational conditions in sections 7 and 8 of the instrument. Section 44 of the ATS Act continues to apply.

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 (Body Scanning – Aviation Security) Class Licence 2018*

Section 1 Name

This section provides for the instrument to be cited as the *Radiocommunications (Body Scanning – Aviation Security) Class Licence 2018*.

Section 2 Commencement

This section provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the instrument, namely section 132 of the Act.

Section 4 Definitions

Section 4 defines key terms used in the instrument. A **body scanner** is defined to mean a scanner that is capable of detecting metallic and non-metallic items on a person by using millimetre-wave radiofrequency technology.

A number of other expressions used in the instrument are defined in the Act or by reference to the *Radiocommunications (Interpretation) Determination 2015*.

Section 5 References to other instruments

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

- (a) a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- (b) 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 6 Class Licence

Section 6 provides that the instrument authorises a screening authority or a screening officer to operate a body scanner for the purpose of carrying out screening of persons at a security controlled airport, in accordance with the conditions specified in section 7. ‘Screening officer’, ‘screening authority’ and ‘security controlled airport’ each has the meaning given by the ATS Act. Notices of declarations of security controlled airports are published in the *Gazette* and on the Federal Register of Legislation.

Section 6 also provides that a registered training organisation, or a person employed or contracted to a registered training organisation, can operate the body scanner for training screening officers, subject to the conditions specified in sections 7 and 8. ‘Registered training organisation’ has the meaning given by the *National Vocational Education and Training Regulator Act 2011*.

Section 7 Conditions for operation by an authorised person

Operation of a body scanner under the class licence by an authorised person must comply with the conditions set out in section 7 of the instrument. Those conditions provide that:

- a body scanner must be operated in the frequency range from 24.25 GHz to 30 GHz, at a radiated power that does not exceed a maximum instantaneous equivalent isotropically

radiated power (**EIRP**) of -10 dBm and a maximum power spectral density of -10 dBm per 4 MHz; or

- a body scanner must be operated in the frequency range from 67 GHz to 80 GHz, at a radiated power that does not exceed a maximum instantaneous EIRP of 7 dBm and a maximum power spectral density of 7 dBm per 1 MHz.

Additionally, the following conditions apply:

- a body scanner must be operated indoors at security controlled airports;
- a body scanner must be operated in compliance with the general public exposure limits specified in the ARPANSA Standard;
- operation of a body scanner (whether or its own, or in conjunction with the operation of other transmitters) must not cause any interference to the operation of radiocommunications services.

Section 8 Additional conditions for operation by registered training organisation

Section 8 imposes an additional condition on the operation of a body scanner by a registered training organisation or an employee or contractor of a registered training organisation. There must be a written agreement in place between the registered training organisation and a screening authority before the registered training organisation or its employee or contractor can operate the scanner.