

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Exemption – Visiting Dignitaries) Determination 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Exemption – Visiting Dignitaries) Determination 2023 (the instrument)* under subsection 27(2) of the *Radiocommunications Act 1992 (the Act)*.

Under subsection 27(2) of the Act, the ACMA may determine that acts or omissions of members of a class of persons performing a function or duty in relation to, among other things, the Australian Federal Police (**AFP**), the police force of a State or Territory, or the defence, security or international relations of Australia, 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.

Purpose and operation of the instrument

The purpose of the instrument is to facilitate use and importation of electronic counter measures associated with the security of a visiting dignitary by relevant persons.

From time to time, a visiting dignitary visits Australia in order to conduct diplomatic, strategic or philanthropic activities. Such persons may include:

- a head of state, deputy head of state, head of government, or deputy head of government, of a nation other than Australia (for example the President of country);
- a member of a branch of the government of a nation other than Australia (for example the Chief Justice of the supreme court of a country, or a member of the Parliament of a country);
- a member of or delegate to the governing body, or similar, of an international organisation (for example, the representative of a country on the Security Council or General Assembly of the United Nations.)

The instrument exempts certain acts and omissions of a person performing a function or duty in relation to the AFP or the police force of a State or Territory, or a person performing a function or duty in relation to the defence, security or international relations of Australia (each a **relevant person**), from the operation of Parts 3.1, 4.1 and 4.2 of the Act. The exemption only operates in relation to the presence in Australia of a visiting dignitary named by the ACMA in a notifiable 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.

In particular, in Part 4.1, the operation, possession, supply and offer of supply, of specified equipment may be prohibited if the ACMA imposes a permanent ban on that equipment under section 172 of the Act. The ACMA has imposed a permanent ban on public mobile telecommunications service (**PMTS**) jamming equipment, radionavigation-satellite service (**RNSS**) jamming equipment, and radio local area network (**RLAN**) and remotely piloted aircraft system (**RPAS**) jamming equipment by making the *Radiocommunications (Jamming Equipment) Permanent Ban 2023 (the permanent ban)*.

Where the ACMA has imposed a permanent 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).

The instrument exempts certain acts and omissions of a member of a police force, or a person performing a function or duty in relation to the defence, security or international relations of Australia (**relevant person**) from the operation of Parts 3.1, 3.2 and 4.2 of the Act in certain circumstances.

In order to be exempt, the acts or omissions of the relevant person must be done, or occur:

- in the performance of the person's duties in relation to the police force, or to the defence, security or international relations of Australia; and
- in relation to the implementation of electronic counter measures associated with the security of a visiting dignitary, during a period (**the dignitary security period**) associated with the dignitary's visit to Australia.

Visiting dignitaries can be the target of deliberate attacks, which can employ the use of, among other things, radiocommunications devices and equipment, including:

- explosive devices triggered by mobile handsets operating on PMTS frequencies, or activated by RLAN devices
- RNSS tracking equipment attached to persons or property
- RPAS flying at or near people or property, or carrying explosives or chemical dispersants
- PMTS jamming equipment
- RNSS jamming equipment
- RLAN and RPAS jamming equipment.

Visiting dignitaries often attend public events and gatherings (such as major events or commemorative ceremonies) and diplomatic or government buildings (such as embassies or the Parliament House). Attacks directed towards visiting dignitaries have the potential to endanger other persons working at or attending those locations and events. Such attacks can also endanger the safety and security of persons providing protection and security for visiting dignitaries, including relevant persons.

Electronic counter measures (that is, measures designed to interfere with, disrupt, distort or disturb radiocommunications) can be used to defeat or mitigate the types of attacks identified above. Electronic counter measures can include use of radiocommunications devices not authorised by a licence, and the use of equipment specified in the permanent ban.

The instrument provides that the ACMA may, by notifiable instrument, name a person as a visiting dignitary, and specify the dignitary security period for that person.

Management of risks associated with the use of electronic counter measures

In the event that electronic counter measures are operated by a relevant person, there is a risk that the measures may affect a range of radiocommunications devices and services, including PMTS, RNSS, RLANs and RPAS, for the period the electronic counter measures are active. Affected devices and services could include a wide range of commercial, consumer, government and safety services.

In considering whether to make the exemption, the ACMA weighed the benefits of relevant persons having access to electronic counter measures that can effectively address the safety and security risks posed by attacks using radiocommunications, against the potential impact on other spectrum users.

Noting the low likelihood of electronic counter measures being activated, the ACMA formed the view that the public benefit, and the interests of the defence, security or international relations of Australia, associated with operating electronic counter measures to deal with uses of radiocommunications that pose a risk to the security of visiting dignitaries, and the safety of the public and other persons, 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 measures.

The potential adverse effects associated with use of electronic counter measures are mitigated by the instrument in a number of ways:

- The instrument provides an exemption to a limited class of persons (i.e. a relevant person) and the exemption only applies if the act is performed, or the omission occurs, in the performance of the relevant person's functions and duties in relation to a police force, or the defence, security or international relations of Australia.
- The exemption only applies in relation to the implementation of electronic counter measures associated with the security of a visiting dignitary, and does not apply to more general use of electronic counter measures.
- A visiting dignitary can only be a person so named by the ACMA in a notifiable instrument. The ACMA must not make an instrument naming a person as a visiting dignitary unless:
 - the person is a head of state, deputy head of state, head of government, or deputy head of government, of a nation other than Australia; or
 - the person is a member of a branch of the government of a nation other than Australia; or
 - the person is a member of or delegate to the governing body, or similar, of an international organisation; or
 - the ACMA is satisfied that it is in the interests of the defence, security or international relations of Australia to make the instrument naming the person.
- The exemption only applies during the dignitary security period specified by the ACMA in a notifiable instrument. A dignitary security period so specified must not be more than 14 days, although the ACMA may make more than one notifiable instrument in relation to the same dignitary, should particular circumstances arise warranting the use of electronic counter measures for a period of greater than 14 days.
- When operating electronic counter measures, relevant persons remain subject to all other laws and policies that apply to those persons.

The ACMA also considered that relevant persons implementing electronic counter measures have considerable strategic and operational experience in managing risks associated with using electronic counter measures. Some of the persons to whom the instrument applies have effectively implemented electronic counter measures associated with the security of visiting dignitaries without incidents of interference to radiocommunications. Instruments exempting the acts and omissions of these persons from Parts 3.1, 4.1 and 4.2 of the Act were the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2016*, the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2017* and the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018*.

Beyond the site of operation, the extent of any incidental interference caused by the use of electronic counter measures would be dependent on a range of factors, including natural and man-made geography and structures, and the technical characteristics of services operating in frequency bands adjacent to 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 electronic counter measures are 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 *International Organisations (Privileges and Immunities) Act 1963*, as in force from time to time. The instrument also refers to the Act, without incorporating it by reference.

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 and 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; the Civil Aviation Safety Authority; Corrective Services NSW; Department 13; the Department of Defence; the Department of Home Affairs; the 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, 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 the submissions acknowledged that deployment of such technologies could involve a separate set of risks, such as interference to radiocommunications services, one submission also stated that “due consideration needs to be given for the public benefit of such capabilities in the context of actual impact to other users”. On balance, the use of electronic counter measures that can cause temporary interference to licensed radiocommunications services is a proportional response to scenarios where the risks of not intervening are likely to be unacceptable from a public safety, security, and diplomatic and international relations stance.

Some submissions from mobile network operators suggested that the instrument require that relevant persons provide information about their operational activities to mobile network operators. One submission also queried how much advance notice the ACMA would seek from persons relying on the instrument before making a notifiable instrument naming a visiting dignitary and setting the dignitary security period.

Visits to Australia by visiting dignitaries often entail a range of diplomatic, security and operational sensitivities, ranging from the specific technical capabilities of electronic counter measures to precise, pre-planned itineraries, travel routes and contingency plans. Requiring relevant persons to provide information of this nature to mobile network operators could breach security protocols, endanger the safety and security of visiting dignitaries, and jeopardise Australia’s diplomatic relationships, and compromise the overall interests of the defence, security or international relations of Australia.

In considering submissions received, the ACMA noted that the publication of the notifiable instrument on the Federal Register of Legislation, which specifies the relevant visiting dignitary and the dignitary security period, will provide an appropriate measure of transparency for stakeholders about activities being conducted under the instrument.

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 – Visiting Dignitaries) Determination 2023*

Section 1 Name

Section 1 provides for the instrument to be cited as the *Radiocommunications (Exemption – Visiting Dignitaries) 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 of this instrument

Section 4 provides that the instrument will be repealed five years after it commences.

Section 5 Interpretation

Section 5 defines key terms used in the instrument.

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

Section 6 References to other instruments

Section 6 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 7 Exemption – relevant persons

Section 7 provides that an act or omission by a relevant person is exempt from all of Parts 3.1, 4.1 and 4.2 of the Act, if those acts or omissions occur in particular circumstances, set out in section 8.

Section 8 Exemption – circumstances in which the exemption applies

Section 8 provides the circumstances in which section 7 applies in relation to a relevant person. In order for the acts or omissions of a relevant person to be exempt, those acts or omissions must be done, or occur, in the performance of the relevant person's functions and duties in relation to the AFP, or the police force of a State or Territory, or the defence, security or international relations of Australia, as the case may be. Further, the act or omission must occur both in relation to the implementation of electronic counter measures associated with the security of a visiting dignitary, and during the dignitary security period for the visiting dignitary. Section 8 also provides that the implementation of electronic counter measures may include the use of an electronic counter measure vehicle, as some visiting dignitaries have specialist vehicles for their protection.

Section 9 Notifiable instrument – visiting dignitary and dignitary security period

Section 9 provides that the ACMA may, by notifiable instrument, name a person as a visiting dignitary, and specify a period for that person (**dignitary security period**). Further, the ACMA must not make a notifiable instrument unless the person holds or performs one of the roles or functions specified, or the ACMA is satisfied that it is in the interests of the defence, security or international relations of Australia to make the instrument naming the person. This section also provides that a dignitary security period must not be more than 14 days.

In accordance with subsection 33(3) of the *Acts Interpretation Act 1901*, the power under section 9 may be exercised more than once, including more than once in relation to the same visiting dignitary.

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 – Visiting Dignitaries) Determination 2023

Overview of the instrument

The instrument provides an exemption to a person performing a function or duty in relation to the Australian Federal Police (AFP) or the police force of a State or Territory, or a person performing a function or duty in relation to the defence, security or international relations of Australia (each a **relevant person**), from the operation of Parts 3.1, 4.1 and 4.2 of the Act.

The purpose of the instrument is to allow relevant persons to import and use measures designed to interfere with, disrupt, distort or disturb radiocommunications (**electronic counter measures**) associated with the security of a visiting dignitary during a specified period (**the dignitary security period**).

There is a risk that electronic counter measures used by relevant persons under the instrument may affect a range of radiocommunications services and devices, including public mobile telecommunications services (**PMTS**) and radio local area network (**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 electronic counter measures may have the possible effect of disrupting for example, the Wi-Fi connection of public users (with Wi-Fi connections facilitated by RLANs), and the quality of PMTS.

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

Electronic counter measures 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 during the dignitary security period (which is limited to 14 days) and in limited areas (based on the itinerary and actual location of the visiting dignitary), and in the performance of a relevant person's functions and duties in relation to the AFP, the police force of a State or Territory, or the defence, security or international relations of 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 could affect the right of freedom of expression; however, any effect is limited and proportional to the purpose of providing security for a visiting dignitary (and the security and safety of other persons), and in the interests of the defence, security or international relations of Australia, 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.