

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

Radiocommunications (PMTS Jamming Devices – Visiting Forces and Suppliers) Exemption Determination 2011

Radiocommunications Act 1992

Purpose

The purpose of the *Radiocommunications (PMTS Jamming Devices – Visiting Forces and Suppliers) Exemption Determination 2011 (the Determination)* is to enable visiting forces and suppliers to the Department of Defence and the Defence Force (**Defence**) and to visiting forces to conduct jamming activity on any frequency band used for the supply of a public mobile telecommunications service (**PMTS**).

The Determination exempts any act or omission by a member of a visiting force, a member of a civilian component of a visiting force or a supplier to Defence or a visiting force in relation to the use, operation, possession or supply of a PMTS jamming device from Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992 (the Act)* under specified circumstances.¹

The Determination supports visiting forces and Defence to carry out their functions and responsibilities and supplements the exemptions provided to Defence under sections 24 to 26 of the Act.

The Determination revokes the *Radiocommunications (Prohibited Device) (Mobile Telephone Jamming Devices) Exemption Determination 2004 (the 2004 Defence ED)*.

Legislative Provisions

Subsection 27(2) of the Act allows the Australian Communications and Media Authority (**the ACMA**) to determine that acts or omissions by members of a class of persons, to whom section 27 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. An exemption may be expressed to apply generally or in specified circumstances.

The Act is the primary legislation under which the ACMA regulates radiofrequency spectrum in Australia. In general, the Act requires that the use of radiocommunications devices:

- be licensed (Part 3.1);
- meet certain standards and other technical requirements (Part 4.1); and
- be conducted so as to avoid causing disruption or unacceptable interference to other radiocommunications services (Part 4.2).

Part 3.1 of the Act identifies certain actions as offences. For example, a person must not, without reasonable excuse, operate a radiocommunications device, nor have such a device in their possession for the purpose of its operation, otherwise than as authorised by a licence (see sections 46 and 47 of the Act).

¹ PMTS jamming device has the same meaning as in the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011*.

Part 4.1 of the Act provides for standards and other technical regulation and imposes prohibitions relating to non-standard devices.

In particular, Division 8 of Part 4.1 of the Act includes section 189 of the Act, which provides that a person must not, without reasonable excuse, operate or supply a device that the person knows is a device in respect of which a declaration is in force under section 190, or have a device that the person knows, or ought reasonably to know, is such a device in his or her possession for the purpose of operating or supplying the device.

Part 4.2 creates offences relating to radio emission (for example, using a transmitter in a way that is likely to interfere substantially with radiocommunications by certain emergency services, or endanger the safety of another person).

A determination made under subsection 27(2) of the Act is a legislative instrument for the purposes of the *Legislative Instruments Act 2003 (the LIA)*.

Background

In 1999, the Australian Communications Authority (**the ACA**) made a declaration under section 190 of the Act prohibiting the operation, supply or possession, for the purposes of operation or supply, of jamming devices operating on the 825-845 MHz and 870-960 MHz frequency bands, which at the time were the only bands allocated to PMTS. These devices were prohibited because of their adverse effect on radiocommunications, as detailed in the *Notification that the Australian Communications and Media Authority prohibits the operation or supply, or possession for the purpose of operation or supply, of specified devices (the 1999 Prohibition)*.

In 2004, the ACA made the 2004 Defence ED which exempted any act or omission by a member of the Defence Force, an officer of the Department of Defence, a member of a visiting force or civilian component of a visiting force, and certain suppliers to the Defence Force, the Department of Defence or a visiting force, from section 189 and Part 4.2 of the Act in relation to the operation, supply or possession, for the purpose of operation or supply, of a mobile phone jamming device designed to operate on the 825-845 MHz and 870-960 MHz frequency bands. The purpose of the Defence ED was to enable mobile phone jamming by those persons involved in Defence-related activities.

Following a review of mobile phone jammer regulation, in March 2011 the ACMA revoked the 1999 Prohibition and made the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011 (the 2011 Prohibition)*. This review was conducted because additional frequency bands had been allocated to PMTS since the 1999 Prohibition was made. The 2011 Prohibition prohibits the operation, supply or possession, for the purposes of operation or supply, of jamming devices that operate on a frequency band used for the supply of a PMTS.

This Determination has been made by the ACMA to ensure that those who were covered by the 2004 Defence ED can lawfully operate, supply and possess, for the purpose of operating or supplying, jamming devices that operate on a frequency band referred to in the 2011 Prohibition (namely, a frequency band used for the supply of a PMTS).

The ACMA also used this opportunity to redraft the instrument in line with current drafting practices and regulatory arrangements. The additional changes made are as follows:

- The classes of persons to whom the exemption applies have been narrowed so that the exemption will apply to members of a visiting force or a civilian component of a visiting force, and to suppliers to Defence and visiting forces. It is not necessary to include members of the Defence Force or officers of the Department of Defence in the scope of the Determination because to the extent that such persons operate, supply or possess, for the purposes of operating or supplying, jamming devices of the kind covered by the Determination, those persons are exempt from Parts 3.1, 4.1 and 4.2 of the Act by virtue of section 26 of the Act.
- The exemption includes all of Parts 3.1, 4.1 and 4.2 of the Act, not only section 189 and Part 4.2 of the Act. This makes the Determination consistent with the exemption provided to members of the Defence Force and officers of the Department of Defence under section 26 of the Act and is the broadest exemption available under section 27 of the Act.
- The Determination includes a provision requiring visiting forces, civilian components of visiting forces and suppliers to Defence and visiting forces, to obtain Defence approval for jamming activity prior to operating a device and that the jamming activity is undertaken in accordance with that approval. This provision will ensure that Defence has scrutiny over the use of these devices by visiting forces, civilian components of visiting forces and suppliers to Defence and visiting forces, and enables Defence to set parameters in relation to any jamming activities.

Consultation

The ACMA consulted directly with those bodies that are likely to be affected by the Determination. The Department of Defence and spectrum licensees in the 1800 MHz and 2100 MHz frequency bands were provided with a draft of the Determination and invited to provide comment. The spectrum licensees consulted were Optus, Vodafone Hutchison Australia, Telstra and five state railway bodies.

The ACMA received ten submissions in response to the targeted consultation process. The ACMA acknowledged all submissions it received and gave due consideration to the comments provided. Additional amendment was made to the instrument in response to this consultation.

The ACMA is satisfied that the consultation undertaken was appropriate for the purpose of section 17 of the LIA.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has considered the matter and formed the opinion that a Regulatory Impact Statement (RIS) was not required. The RIS exemption number is 12838.

Detailed description of the Declaration

Further detail about the Determination is provided in the **Attachment**.

NOTES ON SECTIONS

Section 1 Name of Determination

The Determination is called the *Radiocommunications (PMTS Jamming Devices – Visiting Forces and Suppliers) Exemption Determination 2011*.

Section 2 Commencement

The Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 Revocation

The *Radiocommunications (Prohibited Device) (Mobile Telephone Jamming Devices) Exemption Determination 2004*, which had been made under subsection 27(2) of the Act, is revoked.

Section 4 Definitions

Section 4 defines terms used throughout the Determination. In particular, the Determination adopts the definition of “PMTS jamming device” in section 4 of the 2011 Prohibition so as to ensure that the exemption afforded by the Determination will apply in relation to jamming devices that operate on any frequency band used for the supply of a PMTS.

Section 5 Exemption in relation to certain activities by visiting forces

Subsection 5(1) provides that an act or omission by a “visiting person” in relation to the use, operation, possession or supply of a PMTS jamming device is exempt from Parts 3.1, 4.1 and 4.2 of the Act in the circumstances specified in subsection (3).

Subsection 5(2) defines a ‘visiting person’ to identify the class of persons to whom the exemption afforded by this section applies. For the purpose of this section, a visiting person means a person who is a member of a visiting force or a member of a civilian component of a visiting force, performing a specified function or duty as detailed in paragraph 5(2)(b). The wording of paragraph 5(2)(b) reflects the wording of paragraph 27(1)(a) of the Act so that it is clear that the relevant person must fall within the class of persons in respect of whom an exemption may be made.

Subsection 5(3) specifies the circumstances that must exist for the exemption under subsection 5(1) to apply. This subsection requires that the act or omission occur in the performance of the person’s functions or duties as a member of a visiting force or civilian component of a visiting force. If the act or omission involves the use or operation of a PMTS jamming device, this subsection also requires that the use or operation of the device be approved in writing by the Department of Defence or Defence Force and that the use or operation of the device occurs in accordance with that approval.

Section 6 Exemption in relation to certain activities by suppliers of PMTS jamming devices for visiting forces

Subsection 6(1) provides that an act or omission by a supplier in relation to the use, operation, possession or supply of a PMTS jamming device is exempt from Parts 3.1, 4.1 and 4.2 of the Act in the circumstances specified in subsection (3).

Subsection 6(2) defines ‘supplier’ to identify the class of persons to whom the exemption afforded by this section applies. In order to fall within the definition of “supplier”, a person must be a party to a written agreement that is for the supply of a PMTS jamming device to a visiting force, and the agreement must be approved in writing by a member of the Defence Force or an officer of the Department of Defence. In addition, the person must be performing a function or duty as detailed in

paragraph 6(2)(b). The wording of paragraph 6(2)(b) reflects the wording of paragraph 27(1)(a) of the Act so that it is clear that a person will only be a supplier if the person falls within the class of persons in respect of whom an exemption may be made.

Subsection 6(3) specifies the circumstances that must exist for the exemption under subsection 6(1) to apply. This subsection requires that the act or omission occurs in accordance with the relevant agreement for the supply of the device to the visiting force. If the act or omission involves the use or operation of a PMTS jamming device, this subsection also requires that such use or operation must have been approved in writing by the Department of Defence or Defence Force and that the use or operation of the device occurs in accordance with that approval.

Section 7 Exemption in relation to certain activities by suppliers of PMTS jamming devices to Defence Force or Department of Defence

Subsection 7(1) provides that an act or omission by a supplier in relation to the use, operation, possession or supply of a PMTS jamming device is exempt from Parts 3.1, 4.1 and 4.2 of the Act in the circumstances specified in subsection (3).

Subsection 7(2) defines 'supplier' to identify the class of persons to whom the exemption afforded by this section applies. In order to fall within the definition of "supplier", a person must be a party to a written agreement that is for the supply of a PMTS jamming device to the Defence Force or the Department of Defence, and the agreement must be signed by a member of the Defence Force or an officer of the Department of Defence in the performance of his or her functions. In addition, the person must be performing a function or duty as detailed in paragraph 7(2)(b). The wording of paragraph 7(2)(b) reflects the wording of paragraph 27(1)(a) of the Act so that it is clear that a person will only be a supplier if the person falls within the class of persons in respect of whom an exemption may be made.

Subsection 7(3) specifies the circumstances that must exist for the exemption under subsection 7(1) to apply. This subsection requires that the act or omission occurs in accordance with the relevant agreement for the supply of the device to the Defence Force or the Department of Defence. If the act or omission involves the use or operation of the PMTS jamming device, this subsection also requires that such use operation must have been approved in writing by the Department of Defence or Defence Force and that the use or operation of the device occurs in accordance with that approval.