**EXPLANATORY STATEMENT**

**Issued by the Australian Communications and Media Authority**

***Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2014***

***Radiocommunications Act 1992***

**Purpose**

The purpose of the *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2014* (the Determination) is to allow the trial of public mobile telecommunications service jamming devices (PMTS jamming devices) by Corrective Services NSW (CSNSW) at the Lithgow Correctional Centre to recommence for a further 12 month period.

The operation or supply of a PMTS jamming device, or the possession of a PMTS jamming device for the purposes of its operation or supply, is prohibited under Part 4.1 of the *Radiocommunications Act 1992* (the Act). The Determination, which is made under subsection 27(2) of the Act, exempts acts or omissions relating to the use, operation, possession or supply of certain PMTS jamming devices by certain persons who perform functions or duties in relation to CSNSW from Part 4.1 of the Act and from Parts 3.1 and 4.2 of the Act, which deal respectively with licensing and interference to other radiocommunications services.

**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.

Under paragraph 27(1)(be) of the Act, the ACMA may, by written determination, 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 section 27(1) applies.

Determinations made under paragraph 27(1)(be) and subsection 27(2) of the Act are legislative instruments for the purposes of the *Legislative Instruments Act 2003* (Cth).

**Background**

The operation or supply, or possession for the purposes of operation or supply, of a public mobile telecommunications service (PMTS) jamming device is prohibited under section 189 of the Act (see the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011* (the Declaration) made under subsection 190(1) of the Act).

In 2009, CSNSW sought an exemption from the ACMA under section 27 of the Act to enable CSNSW to lawfully conduct a trial of PMTS jamming devices at the Lithgow Correctional Centre. This trial would help inform decision making on whether it would be in the public interest to allow deployment of PMTS jamming devices in New South Wales (NSW) correctional facilities. The use of mobile phones by inmates is considered to be a serious problem by CSNSW. While it is an offence in NSW for an inmate to use or possess a mobile phone without reasonable excuse, detection of possession and use of mobile phones can be difficult.

In September 2010, the ACMA made the *Radiocommunications (Bench Testing by Corrective Services NSW of Mobile Telephone Jamming Device) Exemption Determination 2010* (the Bench Testing Determination). The Bench Testing Determination allowed CSNSW to conduct bench testing of possible jamming devices in a shielded environment, prior to the testing of a jamming device in a correctional centre. This resulted in the recommendation of a preferred jamming technology for testing in a field trial.

To enable the field trial of PMTS jamming devices at the Lithgow Correctional Centre, the ACMA made the *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2012* (the 2012 Determination)on 17 December 2012. The 2012 Determination expired on 30 September 2014.

On 30 September 2014, CSNSW requested that the ACMA provide another exemption to enable the continued operation of the jammer system, while a report is prepared by CSNSW for the ACMA on performance indicators relating to the jammer system. Recommencing the trial while the report is prepared, and while it is under consideration by the ACMA, would allow CSNSW to undertake any further tests or activities that might be necessary to respond to any matters that the ACMA may identify in its consideration of the report.

**Operation**

An exemption under subsection 27(2) may only be made in respect of a class of persons to whom section 27 applies. Section 27 applies to a person performing a function or duty in relation to a body, or kind of body, listed in subsection 27(1). CSNSW is not one of the bodies listed in subsection 27(1) of the Act. CSNSW is, however, a body that ‘performs functions related to the … prosecution of serious crime’ (paragraph 27(1)(be)) and may, therefore, fall within the scope of section 27 if the ACMA makes a determination in writing for the purposes of that paragraph covering CSNSW.

The Determination:

* provides, for the purposes of paragraph 27(1)(be) of the Act, that CSNSW is a body to which section 27 of the Act applies; and
* exempts, from Parts 3.1, 4.1 and 4.2 of the Act, any act or omission by certain staff or contractors of CSNSW relating to the use, operation, possession or supply of certain PMTS jamming devices provided that the act or omission occurs in the circumstances set out in the Determination.

The field trial will recommence in October 2014 and finish on 31 October 2015.

Further details about the Determination, including the circumstances in which the exemption will apply, are set out in the Notes on Sections in **Attachment A**.

**Consultation**

From 1 to 7 October 2014, in accordance with section 17 of the *Legislative Instruments Act 2003*, the ACMA consulted directly with the three licensed mobile telecommunications carriers, the Department of Communications and the Attorney-General’s Department. Given the effect of the Determination is to enable a continuation of the previous 2012 Determination with no significant changes, the Determination is considered minor and machinery in nature and it was not considered necessary to undertake further consultation.

**Regulatory Impact**

The Office of Best Practice Regulation (OBPR) was consulted and advised that the proposed regulatory change is minor or machinery in nature and that no further regulatory impact analysis is required. The OBPR reference number is 17,700.

**Documents Incorporated in the Determination by Reference**

The following documents are incorporated by reference in this Determination:

* the Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3kHz to 300 GHz (2002), a standard published by the Australian Radiation Protection and Nuclear Safety Agency;
* a map of the Lithgow Correctional Centre, agreed in writing by the ACMA and Corrective Services NSW; and
* the Declaration.

The Declaration is a legislative instrument and can be found on the Australian Government’s ComLaw website at <http://www.comlaw.gov.au>.

The Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields – 3kHz to 300 GHz (2002) may be obtained from the Australian Radiation Protection and Nuclear Safety Agency website (<http://www.arpansa.gov.au>).

The map of the Lithgow Correctional Centre sets the field trial zone and is available from the ACMA upon request.

**Statement of Compatibility with Human Rights**

A statement of compatibility with human rights for the purpose of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment B.**

**ATTACHMENT A**

**NOTES ON SECTIONS**

**Section 1 Name of instrument**

Section 1 provides for the citation of the Determination as the *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming devices at Lithgow Correctional Centre) Exemption Determination 2014.*

**Section 2 Commencement**

The Determination will commence the day after it is registered.

**Section 3 Definitions**

Section 3 defines important terms used throughout the Determination including ‘designated frequencies’, ‘field trial participant’, ‘field trial zone’ and ‘nominated PMTS jamming device’.

Designated frequencies defines the downlink frequencies that will be jammed during the field trial to prevent the use of a PMTS within Lithgow Correctional Centre.

Field trial participant is defined in subsection 6(2) of the Determination to include CSNSW staff members and any field trial contractors and their employees.

Field trial zone defines the area of the field trial within the Lithgow Correctional Centre and as depicted on a map agreed in writing by the ACMA and CSNSW.

Nominated PMTS jamming device defines the PMTS jamming device that will be used in the field trial as that which has been agreed in writing between CSNSW and the ACMA.

**Section 4 Corrective Services NSW is a body for the purpose of paragraph 27(1)(be) of the Act**

By virtue of section 4, CSNSW is a body covered by a written determination made by the ACMA for the purposes of paragraph 27(1)(be) of the Act. This enables the ACMA to make an exemption under subsection 27(2) in relation to persons performing functions or duties in relation to CSNSW, including the staff and contractors described in subsection 6(2) of the Determination.

**Section 5 Determination expires**

The Determination will expire on 31 October 2015, as if it had been repealed by another instrument.

**Section 6 Exemption in relation to the field trial**

Subsection 6(1) provides that any act or omission by a field trial participant in relation to the use, operation, supply or possession 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 6(3).

Subsection 6(2) defines a field trial participant for the purposes of subsection 6(1) as a person performing a function or duty in relation to CSNSW and who is either a CSNSW staff member, a person who has a contract with CSNSW in relation to the field trial or a person who is employed or engaged by a person who has a contract with CSNSW in relation to the conduct of the field trial.

Subsection 6(3) specifies all the circumstances that must exist for acts or omissions of field trial participants relating to the use, operation, possession or supply of a PMTS jamming device to be exempt from Parts 3.1, 4.1 and 4.2 of the Act.

One of the circumstances that must exist is that the ACMA has not notified CSNSW in writing that all field trial participants are excluded from relying on the Determination, or if the ACMA has so notified CSNSW, that the period specified or any extension has expired or the notice has been withdrawn (see paragraph 6(3)(a)).

Examples of the kinds of situations in which the ACMA might decide to notify CSNSW that field trial participants are excluded from relying on the Determination include:

* a failure to implement or observe arrangements between CSNSW and industry about the conduct of the trial;
* threats to public safety resulting from the operation of the PMTS jamming devices;
* monitoring and reporting arrangements regarding the impact of the field trial on the operation of mobile telecommunications networks are deficient;
* harmful emissions occur outside the field trial zone; or
* public complaints are received about the operation of the field trial that require further investigation before the trial can continue.

Paragraphs 6(3)(b) and 6(3)(c) specify safeguard requirements for harmful interference during the field trial. Paragraph 6(3)(b) specifies that any act or omission must be done for the purposes of the field trial. Paragraph 6(3)(c) specifies that the act or omission must occur for the purpose of causing harmful interference to radiocommunications on designated frequencies in the field trial zone; must not cause radio emissions above -128.5 dBm/kHz on non-designated frequencies outside the field trial zone; and must occur in accordance with the standard published by the Australian Radiation Protection and Nuclear Safety Agency *Radiation Protection Standard for Maximum Exposure Levels to Radiofrequency Fields–3kHz to 300 GHz (2000)*.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2014***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The ACMA has made the *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2014* to enable the re-commencement of the trial of public mobile telecommunications service jamming devices by Corrective Services NSW at the Lithgow Correctional Centre.

**Human Rights Implications**

This Legislative Instrument engages an applicable right or freedom, namely the right to freedom of opinion and expression. The use of these jamming devices is intended to prevent inmates at the Lithgow Correctional Centre from being able to use mobile telecommunications and therefore impacts upon their freedom of expression. However, the legislative instrument is not incompatible with the right engaged as the limitation is reasonable, necessary and proportionate to the achievement of the legitimate objective of preventing inmates from using mobile phones in an unsupervised manner in a correctional facility.

It is an offence under 27DA(1) of the *Summary Offences Act 1988* (NSW) for an inmate to use or possess a mobile phone without reasonable excuse as the use of mobile phones may allow inmates to continue to be involved in criminal activity outside the confines of the correctional facility. This is a threat to the proper administration of correctional facilities and is contrary to the objectives of imprisonment. It is difficult to detect the use and possession of mobile phones in correctional facilities. It is considered that a trial of mobile phone jamming devices to prevent inmates using mobile phones while in correctional facilities assists in ensuring that inmates are not able to use mobile phones in contravention of the law.

**Conclusion**

This Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Australian Communications and Media Authority**