

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018 (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 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.

Purpose and operation of the instrument

The instrument exempts certain acts and omissions of the AFP, and other specified persons, from the operation of Parts 3.1, 4.1 and 4.2 of the Act. The exemption only operates in particular circumstances and for a particular time, related to a visit to Australia by the Vice President of the United States of America.

Under the Act, radiocommunications devices must not be operated unless authorised by a licence (section 46). Further, the operation and possession of specified radiocommunications devices may be prohibited under section 189 of the Act if the ACMA makes a declaration in relation to those devices under section 190. The ACMA has declared the operation and possession of particular devices to be prohibited. Public mobile telecommunication service (**PMTS**) jamming devices are prohibited under the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011*, and radionavigation-satellite service (**RNSS**) jamming devices are prohibited under the *Radiocommunications (Prohibited Device) (RNSS Jamming Devices) Prohibition Declaration) 2014*.

Where the ACMA has declared a device to be prohibited under section 190 of the Act, the *Customs (Prohibited Imports) Regulations 1956 (the Regulations)* provide that the importation into Australia of such a device is prohibited, unless the conditions, restrictions or requirements specified for that device are met (subregulation 4(2)). Relevantly, the Regulations specify that the device must only be imported by a person whose acts or omissions relating to the device are exempt from section 189 of the Act, under a determination made under subsection 27(2) of the Act (item 11 of Schedule 3 to the Regulations).

The Vice President of the United States of America is scheduled to visit Australia in November 2018. The instrument is necessary to provide an exemption that will facilitate security measures associated with that visit.

The instrument exempts the acts and omissions of the following classes of people (**relevant persons**) from the operation of Parts 3.1, 4.1 and 4.2 of the Act, including section 189, in specified circumstances:

- AFP employees;
- special members of the AFP, appointed under the *Australian Federal Police Act 1979*;
- any other person performing a function or duty in relation to the AFP, or the police force of a State or Territory;
- any other person performing a function or duty in relation to the defence, security or international relations of Australia.

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

- in the performance of the 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;
- in relation to the implementation and use of an electronic counter measure vehicle, associated with the security or protection of the Vice President of the United States of America, during his visit to Australia; and
- during the period commencing on 15 November 2018 and ending on 19 November 2018 (**the relevant period**).

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:

- > *Radiocommunications Act 1992*
- > *Australian Federal Police Act 1979*.

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.

In view of the operational timeline for the visit by the Vice President of the United States of America, and having regard to security and diplomatic sensitivities associated with the operation, the ACMA undertook consultation with key stakeholders who might be affected by electronic counter measures, or who were well positioned to provide commentary. Consultation was undertaken for the period commencing on 18 October 2018 and concluding on 28 October 2018.

Stakeholders consulted were the AFP, the Australian Broadcasting Corporation, the Australian Mobile Telecommunications Association (**AMTA**), the Civil Aviation Safety Authority, Commercial Radio Australia, Department of Defence, Free TV Australia, NBN Co, Optus, the Special Broadcasting Service, Telstra, TPG Telecom, and Vodafone Hutchison Australia. The ACMA received one response, from AMTA, indicating that mobile network operators had not raised any concerns about the proposed exemption determination.

The ACMA considered that this consultation was appropriate in the circumstances, and that it was not reasonably practicable to undertake additional consultation.

Regulatory impact assessment

The Office of Best Practice Regulation (**OBPR**) was consulted and advised that the proposed Determination is not likely to have regulatory impacts for business, individuals or community organisations and a Regulatory Impact Assessment will not be required (OBPR reference number 24237).

Statement of compatibility with human rights

As required by subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a Statement of Compatibility with Human Rights has been prepared by the ACMA and is at **Attachment B**.

Notes to the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018*

Section 1 – Name

This section provides for the instrument to be cited as the *Radiocommunications (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018*.

Section 2 – Commencement

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

Section 3 – Authority

The section identifies the provision of the Act that authorises the making of the instrument, namely subsection 27(2) of the *Radiocommunications Act 1992* (**the Act**).

Section 4 – Cessation

Section 4 provides that the instrument expires on 20 November 2018, as if it had been repealed by another instrument.

Section 5 – Interpretation

Section 5 defines key terms used in the instrument.

Section 6 – Exemption for certain activities in relation to visiting dignitary

Section 6 exempts the acts and omissions of certain classes of people from the operation of Parts 3.1, 4.1 and 4.2 of the Act, if those acts or omissions occur in particular circumstances.

The classes of people are:

- AFP employees;
- special members of the AFP, appointed under the *Australian Federal Police Act 1979*;
- any other person performing a function or duty in relation to the AFP, or the police force of a State or Territory;
- any other person performing a function or duty in relation to the defence, security or international relations of Australia.

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

- in the performance of the 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;
- in relation to the implementation and use of an electronic counter measure vehicle associated with the security or protection of the Vice President of the United States of America, during his visit to Australia; and
- during the relevant period.

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 (Australian Federal Police – Visiting Dignitary) Exemption Determination 2018

Overview of the instrument

The instrument exempts the acts and omissions of Australian Federal Police (AFP) employees, special members of the AFP, and other related persons from the operation of Parts 3.1, 4.1 and 4.2 of the Act, for the purposes of dealing with radiocommunications devices associated with the protection and security of the Vice President of the United States of America, during his visit to Australia in November 2018.

There is a risk that electronic counter measures devices of the type proposed for use by the AFP may affect a range of devices, including mobile phones.

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 an electronic counter measures device of the type proposed has a likely effect of disrupting public mobile telecommunications services.

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 and in limited areas.

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 proportional to the purpose 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 manner which is reasonable, necessary and proportionate to the purpose of the protection of national security and public order during the visit of the Vice President of the United States of America.