**EXPLANATORY STATEMENT**

Approved by the Australian Communications and Media Authority

*Radiocommunications Act 1992*

***Radiocommunications (Exemption) Determination 2021***

**Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Exemption) Determination 2021* (**the instrument**) under subsection 302(2) of the *Radiocommunications Act* (**the Act**).

Under that subsection, the ACMA may, by legislative instrument, determine that one or more specified acts or one or more specified persons are exempt from one or more specified compliance provisions relating to equipment that is subject to a permanent ban or an interim ban, the unlicensed operation of radiocommunications devices, and the unlawful possession of radiocommunications devices.

Subsection 302(5) of the Act provides that a determination made under subsection 302(2) may confer a power to make a decision of an administrative character on the ACMA.

Section 302 of the Act was inserted into the Act by the *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020* (**the** **Modernisation Act**). Section 302 commenced on 17 June 2021.

**Purpose and operation of the instrument**

In recent years, technological advancements and public safety and security concerns have driven heightened interest in equipment that is subject to a permanent ban made under section 172 of the Act. Reflecting this growing interest, stakeholders from Australia’s defence industry, radiocommunications and technology sectors, and government agencies, have approached the ACMA for assistance in realising domestic research, development, trialling and manufacturing opportunities involving equipment subject to a permanent ban. Reforms made by the Modernisation Act have made it possible for the ACMA to make instruments allowing such stakeholders to operate, possess, supply or offer to supply such equipment.

The purpose of the instrument is to establish a framework that will exempt specified acts from the provisions of the Act that prohibit the operation or possession of radiocommunications device otherwise than as authorised by a licence, where the radiocommunications device is subject to a permanent ban, and that prohibit the operation, possession or supply of, or offers to supply, equipment subject to a permanent ban.

*Unlicensed equipment under the Act*

Under section 46 of the Act, it is an offence, and subject to a civil penalty, to operate a radiocommunications device otherwise than as authorised by a spectrum licence, an apparatus licence or a class licence issued under the Act. The maximum penalty for the offence is 2 years imprisonment for an individual, or 1500 penalty units ($333,000 on the current value of a penalty unit) where the radiocommunications device is a radiocommunications transmitter, and 20 penalty units ($4,440 on the current value of a penalty unit) for other radiocommunications devices. The maximum civil penalty is 300 penalty units ($66,600 on the current value of a penalty unit) where the radiocommunications device is a radiocommunications transmitter, and 20 penalty units ($4,440 on the current value of a penalty unit) for other radiocommunications devices.

Under section 47 of the Act, it is an offence, and subject to a civil penalty, to possess a radiocommunications device for the purpose of operating the device otherwise than as authorised by a spectrum licence, an apparatus licence or a class licence. The maximum penalties for the offence, and the maximum civil penalty, are the same for section 47 as for section 46.

*Banned equipment under the Act*

Under subsection 167(1) of the Act, the ACMA may, by notifiable instrument, impose an interim ban on equipment of a specified kind. Under subsection 172(1) of the Act, the ACMA may, by legislative instrument, impose a permanent ban on equipment of a specified kind.

Bans on equipment principally manage the risks associated with the operation and supply of equipment that is, in broad terms, designed, or is likely, to cause interference to radiocommunications. The imposition of a ban on such equipment is generally intended to protect consumers, businesses, government agencies and radiocommunications licensees from the potential interference to radiocommunications that the equipment subject to a ban can cause. Equipment subject to a permanent ban is commonly called a radiocommunications ‘jamming device’ or a ‘jammer’.

Section 170 of the Act imposes civil penalties in relation to the operation or supply of, or an offer to supply, equipment of a particular kind where an interim ban on equipment of that kind is in force. The maximum civil penalty payable is 200 penalty units, or $44,400 on the current value of a penalty unit.

Sections 175 and 176 of the Act impose criminal offences and civil penalties in relation to the operation or supply of, or an offer to supply, equipment, or the possession of equipment for the purpose of operating or supplying it, where a permanent ban on equipment of that kind is in force. An offence is subject to imprisonment for a maximum of 2 years, or a maximum fine of 1000 penalty units ($222,000 on the current value of a penalty unit), or both. The maximum civil penalty payable is 1000 penalty units ($222,000).

Prior to the commencement of the Modernisation Act, declarations made under the now-repealed section 190 of the Act were the equivalents of permanent bans. The two declarations made under the repealed section 190 of the Act are the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011* (**PMTS Jamming Device Ban**) and the *Radiocommunications (Prohibited Device) (RNSS Jamming Devices) Declaration 2014* (**RNSS Jamming Device Ban**). Transitional provisions within the Modernisation Act provide that these instruments have effect as if they had been made as permanent bans under subsection 172(1) of the Act.

Equipment subject to the PMTS Jamming Device Ban or the RNSS Jamming Device Ban is capable of operating on, and causing interference to, public mobile telecommunications services (**PMTS**, more commonly known as mobile or cell phone services) and the radionavigation-satellite service (**RNSS**, more commonly knowns as the global positioning system, or GPS). These radiocommunications services are relied upon by a wide range of businesses, consumers and government agencies for day-to-day convenience, and commercial, safety and security applications. For example, PMTS services are critical for enabling emergency calls, and the RNSS facilitates navigation services for the public and for businesses. Intentional or unintentional interference to these radiocommunications services can lead to inconveniences or major disruptions.

At the time of making the instrument, the ACMA had not made any interim bans under subsection 167(1) of the Act.

*Exemptions under the Act*

An exemption made under subsection 302(2) of the Act may exempt specified acts or specified persons from one or more specified compliance provisions. The compliance provisions from which a person or act may be exempt are listed at subsection 301(1) of the Act:

* subsections 46(1) and (3), relating to the operation of a radiocommunications device otherwise than as authorised by a licence;
* subsections 47(1) and (3), relating to the possession of a radiocommunications device, for the purpose of operating it otherwise than as authorised by a licence;
* subsections 170(1) to (3), relating to the operation or supply of, or an offer to supply, equipment where that kind of equipment is covered by an interim ban;
* subsections 175(1) to (4) and subsections 176(1) to (4), relating to the operation or supply of, or an offer to supply, equipment, or the possession of equipment for the purpose of operating or supplying it, where that kind of equipment is covered by a permanent ban.

The Explanatory Memorandum to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (**the Explanatory Memorandum**) states that exemptions made under section 302 ‘are designed to help promote innovation and industry development opportunities within Australia’. The instrument will promote such opportunities by exempting certain acts from specified compliance provisions. The instrument will have the practical effect of enabling persons relying on the instrument to carry out research and development, and manufacturing activities that lead to the creation, or rely on the use, of equipment subject to one or more permanent bans.

*Public interest considerations*

Under subsection 302(4) of the Act, the ACMA must not determine an exemption under subsection 302(2) unless the ACMA is satisfied that the exemption is in the public interest, or the exemption is of a kind specified in the legislative rules made by the Minister under section 313B of the Act (**the legislative rules**). At the time of making this instrument, the Minister has not specified any kind of exemptions under the legislative rules.

The Explanatory Memorandum states that:

In determining the public interest, ACMA will weigh the broader benefits (as well as the individual benefits accrued to the recipient of an exemption) against any detriments that may flow from an exemption. ACMA will also consider the intrinsic principle of the compliance provision from which an act is being exempted. In many situations, such as the supply of prohibited devices, there must be a strong public interest case for an exemption to be granted.

In considering whether it is satisfied that the instrument was in the public interest, the ACMA has had regard to the object set out in section 3 of the Act. That object is to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that, among other things, facilitates the use of the spectrum for commercial purposes, as well as defence purposes, national security purposes and other non-commercial purposes (including public safety and community purposes).

The ACMA considers that it is in the public interest to strengthen Australian industrial, scientific, technology and manufacturing capabilities, create jobs and support domestic businesses, develop technologies and systems that have clear commercial, safety, security or strategic applications, and support Australian Government policy. The instrument assists such goals by facilitating the potential Australian manufacture and supply of equipment subject to a permanent ban. However, any such benefits must be balanced against the significant risk of interference posed by the operation of equipment subject to a permanent ban.

The ACMA considers the instrument is in the public interest as it imposes several conditions on the operation, possession or supply of, or an offer to supply, such equipment. Any act done otherwise than in accordance with the conditions in the instrument may be an offence, or subject to a civil penalty, and incur the penalties mentioned above.

Importantly, it is a condition that a person must only do a specified act if that person is named in a notifiable instrument made under the subclause 1(1) of Schedule 1 to the instrument (**Schedule 1**) and, at the time the person does the act, the notifiable instrument is in force. This allows the ACMA to exercise a degree of oversight of the people who manufacture and supply equipment subject to a permanent ban. There are a number of other conditions designed to minimise the risk of interference and the inappropriate operation of equipment, discussed in Attachment A.

The instrument does not exempt acts in relation to equipment subject to an interim ban. Due to the short duration of an interim ban, and the fact that no civil penalty applies in relation to possession of equipment subject to an interim ban, the ACMA considered there was no need to provide for an exemption in relation to interim bans.

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**).

The instrument is subject to the sunsetting provisions of the LA; however, section 3 of the instrument provides for its repeal after three years, to facilitate earlier review by the ACMA of its operation.

**Documents incorporated by reference**

Section 314A of the Act provides that an instrument under the Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matters contained in any Act or any other instrument or writing as in force or existing at a particular time or from time to time.

The instrument incorporates the following Acts and legislative instruments by reference, as in force from time to time, or otherwise refers to them:

* the Act;
* the *Acts Interpretation Act 1901*;
* the *Australian Communications and Media Authority Act 2005*;
* the *Customs (Prohibited Exports) Regulations 1958*;
* the *Defence and Strategic Goods List 2019*, or any subsequent instrument made under paragraph 112(2A)(aa) of the *Customs Act 1901*;
* the *Legislation Act 2003.*

Commonwealth legislation can be accessed, free of charge, on the Federal Register of Legislation (<http://www.legislation.gov.au>).

The instrument incorporates, by reference, the *Radiation Protection Standard for Limiting Exposure to Radiofrequency Fields – 100 kHz to 300 GHz (2021)* (**ARPANSA Standard**) and any standard published as a replacement of that standard. The ARPANSA Standard is published by the Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**), and is available, free of charge, from the ARPANSA website ([www.arpansa.gov.au](file:///C%3A/Users/hwallac/AppData/Roaming/Microsoft/Word/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.

The ACMA published on its website a draft of the instrument and a consultation paper setting out its proposed decision-making framework, including how it would satisfy itself of the public interest requirements in the Act and in the instrument, and how it would manage the risks associated with equipment subject to a permanent ban. Views were invited on the instrument and the paper over the period 2 June 2021 to 30 June 2021.

The ACMA also directly notified stakeholders in a position to offer specialist views about the proposed instrument and decision-making framework. Government entities notified were Australian Border Force, Australian Federal Police, Civil Aviation Safety Authority, Department of Defence (**Defence**), Department of Home Affairs, and Department of Infrastructure, Transport, Regional Development and Communications. Commercial entities notified were Australian Mobile Telecommunications Association, Department 13, DroneShield, Nova Systems, Optus, Panasonic Avionics Corporation, Pivotel, Telstra, and TPG Telecom.

Seven submissions were received to the consultation. Submissions acknowledged that exempting access to and use of equipment subject to a permanent ban (**banned devices**) can be in the public interest. Submissions were generally supportive of the ACMA’s proposed decision-making framework for assessing the public interest, and also generally agreed that, subject to some changes, managing the risks associated with banned devices could be achieved by the conditions in the instrument.

One submission indicated that the instrument could facilitate outcomes associated with the [*Australia 2030: prosperity through Innovation Paper*,](https://www.industry.gov.au/data-and-publications/australia-2030-prosperity-through-innovation) published by Innovation and Science Australia.

Some submissions stated that the records to be kept under the instrument should contain more detail. The instrument now requires exempted persons to capture additional information in records about technical characteristics of banned devices that are possessed, operated and supplied.

Some submissions also indicated that persons relying on the instrument should be able to provide banned devices to third parties who can perform testing on those banned devices in order to demonstrate compliance with the instrument. The ACMA considered that this activity was justified and in the public interest, and the instrument now exempts the supply of a banned device to other persons who are named in a notifiable instrument made under subclause 1(1) of Schedule 1.

Some submissions also dealt with matters outside the scope of the instrument.

**Regulatory impact assessment**

Before making the Modernisation Act, the then Department of Communications and the Arts (**the Department**), in conjunction with the ACMA, undertook a [review of the Radiofrequency Spectrum Management Framework](https://ris.pmc.gov.au/2016/06/16/review-radiofrequency-spectrum-management-framework) (Office of Best Practice Regulation (**OBPR**) reference 19096). OBPR has confirmed that this independent review meets the requirements of a Regulation Impact Statement (**RIS**) for the legislative instruments made by the ACMA to implement the reforms introduced to the Act by the Modernisation Act.

The ACMA advised OBPR it was consulting on a proposal to make the instrument. OBPR advised that a further RIS was not required for the instrument (OBPR reference 43339).

**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.

**Attachment A**

**Notes to the *Radiocommunications (Exemption) Determination 2021***

**Section 1 Name**

This section provides for the instrument to be cited as the *Radiocommunications (Exemption) Determination 2021.*

**Section 2 Commencement**

This section provides for the instrument to commence 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 [www.legislation.gov.au](http://www.legislation.gov.au).

**Section 3 Repeal of this instrument**

This section provides that the instrument will be repealed after three years, to facilitate review of its operation by that time.

**Section 4 Authority**

This section identifies the provision of the Act that authorises the making of the instrument, namely subsection 302(2) of the Act.

**Section 5 Definitions**

This section defines a number of key terms used throughout the instrument.

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

Other expressions used in the instrument may be defined in a determination made by the ACMA under subsection 64(1) of the *Australian Communications and Media Authority Act 2005*.

**Section 6 References to other instruments**

This section 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 existing from time to time.

**Section 7 Exempt acts**

This section provides that, subject to the conditions set out in sections 8 to 14, each act specified in an item of the table in the section is exempt from the compliance provisions specified in the corresponding item of the table.

Item 1 of the table provides that possession of a banned device is exempt from compliance provisions relating to subsections 47(1) and 47(3) of the Act (concerning the offence of, and civil penalty for, unlawful possession of radiocommunications devices, respectively), and subsections 175(4) and 176(4) of the Act (concerning the offence of, and civil penalty for, possession of a banned device, respectively).

Item 2 of the table provides that operation of a banned device is exempt from compliance provisions relating to subsections 46(1) and 46(3) of the Act (concerning the offence of, and civil penalty for, unlicensed operation of radiocommunications devices, respectively), and subsections 175(3) and 176(3) of the Act (concerning the offence of, and civil penalty for, operation of a banned device, respectively).

Item 3 of the table provides that supply of a banned device is exempt from compliance provisions relating to subsections 175(1) and 176(1) of the Act (concerning the offence of, and civil penalty for, supply of a banned device respectively).

Item 4 of the table provides that offering to supply a banned device is exempt from compliance provisions relating to subsections 175(2) and 176(2) of the Act (concerning the offence of, and civil penalty for, offering to supply a banned device, respectively).

**Section 8 Condition of exemption – compliance with ARPANSA Standard**

Subsection 8(1) provides that, in order for the acts of possession or supply of a banned device, or offering to supply a banned device, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only do the act if the electromagnetic energy that could be emitted by the device does not exceed the general public exposure limits specified in the ARPANSA Standard in a place that is accessible by the public.

Subsection 8(2) provides that, in order for the act of operation of a banned device, or a group of banned devices, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only operate the device, or the group of devices, if the electromagnetic energy that is emitted by the device, or by the group of devices, does not exceed the general public exposure limits specified in the ARPANSA Standard in a place that is accessible by the public.

**Section 9 Condition of exemption – person named in notifiable instrument**

This section provides that, in order for any act specified in the table in section 7 to be exempt from the specified compliance provisions in that table, a person must only do the act if the person is named in a notifiable instrument made under subclause 1(1) of Schedule 1 and, at the time the person does the act, the notifiable instrument must be in force.

**Section 10 Condition of exemption – restriction on operation of banned device**

This section provides that, in order for the act of operating a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only operate the device in accordance with at least one of the following:

* all emissions from the device are dissipated into a dummy load;
* the device is operated in a screened room, and the signal level of the radio emissions caused by the device at each point of the external surface of the room is not greater than the mean level of ambient radiofrequency noise in the place the room is located;
* the device is operated in accordance with a written permission given by the ACMA to the person under subsection 193(1) of the Act and, at the time the device is operated, the written permission was registered as a notifiable instrument on the Federal Register of Legislation and had not been revoked.

**Section 11 Condition of exemption – restriction on supply of banned device**

This section provides that, in order for the act of supply of a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only supply the device to an entity listed is this section. Other than persons outside Australia, the ACMA and persons who are named in a notifiable instrument made under subclause 1(1) of Schedule 1, the entities listed all relate to Australia’s defence or national security, emergency services or law enforcement.

**Section 12 Condition of exemption – record-keeping requirements**

This section provides that, in order for the act of possession, operation or supply of a banned device, to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person must only do the act if the person complies with the applicable record-keeping requirements set out in the section. Different record-keeping requirements relate to different acts. For example, if the act is the operation of a banned device, the person must only do the act if the person keeps a written record of certain particulars relating to the operation of the device and the prevention or reduction of interference to radiocommunications in that regard; whereas if the act is possession of a banned device, the person must keep a written record of certain particulars relating to the device when the person first came into possession of the device, and when the person ceased to be in possession of it.

**Section 13 Condition of exemption – retention of records**

This section provides that, in order for the act of possession, operation or supply of a banned device to be exempt from the specified compliance provisions in the table in section 7 (as relevant), a person who is required to create a record under section 12 in relation to the act must retain the record for at least 5 years.

If a person who is required to comply with sections 12 and 13 is an ‘organisation’ within the meaning of the *Privacy Act 1988*, and any of the records to be created or retained contain personal information, then the person may have to comply with the Australian Privacy Principles in the handling of that information. A person will not be an ‘organisation’ under the *Privacy Act 1988* if, among other things, the person is a ‘small business operator’ within the meaning of that Act. Section 6D of the *Privacy Act 1988* sets out how to work out whether a person is a small business operator. In essence, a business is a small business at a time in a financial year if its annual turnover for the previous financial year was $3 million or less or, if it is a new business, its annual turnover for the current financial year is $3 million or less.

There may be some cases where persons who are required to comply with sections 12 and 13 are not an ‘organisation’ under the *Privacy Act 1988*. Where this is the case, the Office of the Australian Information Commissioner has issued general advice to the effect that, while such persons are not obliged to comply with the *Privacy Act 1988*, they should, as a matter of best practice, protect any personal information they hold, and should consider whether to opt-in to the *Privacy Act 1988*, given the benefits that may result. More information can be obtained from the website of the Office of the Australian Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

**Section 14 Condition of exemption – providing records to the ACMA or an inspector**

This section provides that, in order for the act of possession, operation or supply of a banned device to be exempt from the compliance provisions specified in the table in section 7 (as relevant), a person who is required to create a record under section 12 in relation to the act must provide a copy of a record created to the ACMA or an inspector if the ACMA or the inspector so requests, in writing.

The person must provide the copy of the record created within such a period, being not less than 2 days, as is specified in the written request.

**Schedule 1–Named persons**

**Clause 1 ACMA may make notifiable instrument**

Subclause 1(1) provides that the ACMA may, by notifiable instrument, name a person for the purpose of section 9 and paragraph 11(m).

Subclause 1(2) provides that the ACMA must not make a notifiable instrument under subclause 1(1) naming a person, unless it is satisfied of the matters specified in this subclause. The ACMA must be satisfied that making a notifiable instrument is in the public interest, or that a notifiable instrument is consistent with the legislative rules. The ACMA must also be satisfied that naming a person in a notifiable instrument would not lead to a significant risk of a contravention of a condition of an exemption under any item of the table in section 7.

Subclause 1(3) provides that the ACMA may make a notifiable instrument under subclause 1(1) regardless of whether a person has made an application under clause 3.

Subclause 1(4) provides that if, before making an instrument under subclause 1(1), the ACMA has reason to believe that a person intends to supply, to a person outside Australia, a banned device that is included in the defence and strategic goods list, the ACMA, in deciding whether to make the instrument, may have regard to certain matters specified in the subclause. Specifically, the ACMA may have regard to whether the person has made an application for permission to export goods in accordance with regulation 13EB of the *Customs (Prohibited Exports) Regulations 1958*, and whether the Defence Minister has granted permission under regulation 13E of those regulations.

Subclause 1(5) provides that the defence and strategic goods list has the meaning given by subregulation 2(1) of the *Customs (Prohibited Exports) Regulations 1958*.

**Clause 2 ACMA may revoke notifiable instrument**

Subclause 2(1) provides that the ACMA may revoke a notifiable instrument made under subclause 1(1).

Without limiting subclause 2(1), subclause 2(2) provides the circumstances where the ACMA must revoke a notifiable instrument. The ACMA must revoke a notifiable instrument where it is satisfied that the instrument is not, or has ceased to be, in the public interest, or where the instrument is not, or has ceased to be, consistent with the legislative rules.

Without limiting subclause 2(2), subclause 2(3) provides that the ACMA may be satisfied that a notifiable instrument is not, or has ceased to be, in the public interest, if the person named in the instrument has contravened a condition of an exemption under any item of the table in section 7, other than the condition in section 9.

Before revoking a notifiable instrument, the ACMA must consult with the person named in the instrument, unless the ACMA is satisfied that such consultation is not in the public interest. Consultation may not be in the public interest, for example, if the ACMA becomes aware that a banned device being used by a person named in a notifiable instrument is causing harmful interference to radiocommunications used in relation to emergency services.

The ACMA must give the person named in the notifiable instrument a written notice of the decision and the reasons for the decision and of the person’s right to request a reconsideration of the decision under clause 4.

**Clause 3 Application that notifiable instrument be made**

Subclause 3(1) provides that a person may apply, in writing, for the ACMA to make a notifiable instrument under subclause 1(1) naming the person for the purposes of section 9 and paragraph 11(m).

Subclause 3(2) provides that an application must be in a form approved by the ACMA (if any); and made in a manner approved by the ACMA (if any).

Subclause 3(3) provides that, if a person makes an application, the ACMA must decide whether to grant the application within 90 days after it is made, or such longer period as agreed between the ACMA and the applicant.

Subclause 3(4) provides that the ACMA must, within 14 days after the decision on the application is made, give the applicant a written notice of the decision; and if the decision is not to grant the application, the reasons for the decision and the applicant’s right to request reconsideration of the decision under clause 4.

**Clause 4 Reconsideration and external review of decisions**

Clause 4 provides for internal reconsideration, and review by the Administrative Appeals Tribunal (**AAT**), of a decision under subclause 2(1) to revoke a notifiable instrument made under subclause 1(1) and a decision under subclause 3(3) not to grant an application to make a notifiable instrument under subclause 1(1).

Subclause 4(1) defines key terms used in clause 4.

Subclause 4(2) provides that an affected person in relation to a relevant decision may request the ACMA to reconsider the decision. An affected person in relation to a decision not to grant an application to make a notifiable instrument under subclause 1(1) is the applicant. An affected person in relation to a decision to revoke a notifiable instrument made under subclause 1(1) is the person named in the instrument.

Subclause 4(3) provides that a request under subclause 4(2) must be made in writing, set out the reasons for the request and be given to the ACMA within 30 days after the affected person is notified of the relevant decision.

Subclause 4(4) provides that the ACMA must, within 90 days after the request is received, reconsider the relevant decision, and affirm it or make a fresh decision to the effect that the ACMA must, within 14 days after the decision is made, make a notifiable instrument under subclause 1(1) naming the affected person for the purposes of section 9 and paragraph 11(m).

Subclause 4(5) provides that the ACMA must, within 14 days after the reconsidered decision is made, give the affected person written notice of the reconsidered decision; and if the reconsidered decision affirms the relevant decision, the reasons for the reconsidered decision and the affected person’s right to have the reconsidered decision reviewed under subclause 4(6).

Subclause 4(6) provides that the affected person may apply to the AAT for review of the reconsidered decision.

**Attachment B**

**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) Determination 2021***

***Overview of the instrument***

The instrument is made under section 302(2) of the *Radiocommunications Act 1992* (**the Act**).

The purpose of the instrument is to establish a framework that will exempt specified acts from the provisions of the Act that prohibit the operation or possession of radiocommunications devices otherwise than as authorised by a licence, and that prohibit the operation, possession or supply of, or offers to supply, equipment subject to a permanent ban. There are two kinds of equipment currently subject to a permanent band: public mobile telecommunications service (**PMTS**) jamming devices and radionavigation satellite service (**RNSS**) jamming devices. PMTS and RNSS jamming devices may cause significant interference with radiocommunications, including essential and emergency communications services.

The exemption in the instrument is subject to conditions. These conditions are intended to ensure that persons relying on the instrument do not inadvertently use banned devices in a manner that might cause interference to radiocommunications. To ensure this, the instrument limits the operation of banned devices to at least one of the following scenarios:

* all radio emissions from the device are dissipated into a dummy load;
* the device is operated in a screened room, and the signal level of the radio emissions caused by the device at each point of the external surface of the room is not greater than the mean level of ambient radiofrequency noise in the place the room is located;
* the device is operated in accordance with a written permission given by the ACMA to a person under subsection 193(1) of the Act and, at the time the device is operated, the written permission was registered as a notifiable instrument on the Federal Register of Legislation and had not been revoked.

A person cannot perform an exempt act under the instrument unless they are named in a notifiable instrument made under subclause 1(1) of Schedule 1 to the instrument. A person cannot perform an exempt act under the instrument unless they keep records required by the instrument.

***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 right to freedom of expression includes the right to seek, receive, and impart information through any media of one’s choice. Article 19 provides that the right to freedom of expression may be limited by certain restrictions, including the protection of national security and public order.

Subject to commercial agreements with providers, and reasonable expectations of service quality and connectivity, the right to communicate using any media of one’s choice conventionally extends to the right to use wireless communication technologies.

Irresponsible operation of banned devices has the potential to interfere with, disturb or disrupt the radiofrequency bands used for wireless communication in Australia, thereby limiting, or compromising, the public’s ability to use such services. To eliminate this risk, conditions in the instrument largely limit the operation of banned devices to use with dummy loads or in screened rooms, which are widely accepted strategies for managing interference.

The instrument may enable limited operational use of banned devices. To operate banned devices in this manner, a person will require further written permission from the ACMA under subsection 193(1) of the Act. This kind of written permission is restricted to authorising interference to a very limited selection of radiocommunications—namely those carried on by, or on behalf of, certain persons, including the Australian Federal Police, or a state or territory police force.

Such limited operational use of banned devices is intended to be kept to a minimum, and practical steps can be taken by operators of banned devices and radiocommunications licensees to minimise or eliminate any adverse effects associated with incidental interference from banned devices. The ACMA may also consult with radiocommunications licensees before giving a written permission to a person under subsection 193(1). This type of engagement is consistent with the ACMA’s general licensing and interference management activities.

Operation of banned devices in this manner is consistent with Article 19. This is because, taking into account the strict conditions to which the instrument is subject, the activities which are permitted by the instrument are unlikely to interfere with the rights expressed in Article 19. Where such activities might interfere with the rights expressed in Article 19, they will occur in accordance with a written permission from the ACMA under subsection 193(1) of the Act. Given the circumstances in which such a permission can be given, such interference would be reasonable, necessary, and proportionate to activities intended to support lawful enhancements to Australia’s national security and public safety protections.

***Conclusion***

The instrument is compatible with human rights because potential limitations on the right of freedom of expression are limited in a manner which is reasonable, necessary, and proportionate to the purpose of enhancing public safety and national security protections.