



22 January 2021

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Via email: dlo@communications.gov.au

Dear Minister,

Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 [F2020L01296]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Compliance with authorising legislation
Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(a) requires the committee to scrutinise each legislative instrument as to whether it accords with its enabling Act and otherwise complies with all legislative requirements. In addition, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 (the instrument) provides exemptions for Australian Federal Police and State and Territory police from the requirements set out in Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992* (the Act), to enable the use of devices designed to disrupt or disable unmanned aircraft and unmanned aircraft systems (counter-drone devices). Section 7 of the instrument also exempts relevant third-party contractors from these requirements of the Act in certain circumstances.

The instrument was made under subsection 27(2) of the Act, which provides that defence, law enforcement and emergency personnel, including members of the Australian Federal Police and State and Territory police, may be exempted from particular provisions of the Act. It is unclear whether this provision also authorises determinations to be made which exempt third-party contractors from the specified provisions of the Act. In this regard, the committee notes that the explanatory statement to the instrument does not identify the authority on which this exemption for third-party contractors purports to rely.

In addition, the committee notes that the instrument deals with significant matters arising from exempting police members and relevant contractors from the requirements of the Act. In this regard, the explanatory statement does not indicate why it is considered necessary and

appropriate to leave these matters to delegated legislation, rather than primary legislation. The committee generally expects such information to be included in the explanatory statement to the instrument.

In light of the above, the committee requests your advice as to the legislative authority under which the instrument provides that relevant third-party contractors are exempt from Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **5 February 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MS21-000058

Senator The Hon Concetta Fierravanti-Wells
Chair, Senate Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator

Thank you for your letter dated 22 January 2021, regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) concerns in relation to the *Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020* (the Determination). I am sorry it has taken me so long to respond.

I understand the Committee's concerns relate primarily to the legislative authority for exempting third-party contractors from the requirements of Parts 3.1, 4.1 and 4.2 of the *Radiocommunications Act 1992* (the Act).

With respect to the matter of authorising exemptions for third-party contractors from parts of the Act, subsection 27(2) of the Act allows the Australian Communications and Media Authority (ACMA) to determine exemptions in relation to classes of persons to whom the section applies. Subsection 27(1) of the Act defines to whom the section applies, including 'a person performing a function or duty in relation to... (b) the Australian Federal Police or a police force of a State or Territory.'

The authority for ACMA to determine exemptions is intended to apply to all persons performing duties or functions *in relation to* defence, security, international relations and various law enforcement and emergency bodies and organisations, either named or generically described. The exemption power is not confined to members of those bodies and organisations but is deliberately intended to extend to those who may play an important auxiliary role. For example, the explanatory memorandum to the *Communications Legislation Amendment Bill (No. 1) 2002* advised that this provision is designed to encompass the roles that non-police personnel had in certain operations, such as the role of non-police staff in performing technical surveillance operations.

Within the context of this Determination, the role of contractors in testing and maintaining devices that are to be operated to disrupt or disable an unmanned aircraft is a function or duty in relation to the Australian Federal Police or the police force of a State or Territory, for the purposes of section 27 of the Act. The definition of 'relevant contractor' is a person who 'has entered into a contract with a police force to perform a function or duty in relation to that police force that consists of one or both of the following: (a) testing of a device that is to be operated to disrupt or disable an unmanned aircraft... or (b) maintenance of a device that is to be operated to disrupt or disable unmanned aircraft'. Without this extension to contractors having expert technical skills, the relevant police forces would not have access to properly-tested and properly-maintained equipment of the kind which the Determination is intended to facilitate.

ACMA will provide a revised explanatory statement for the Determination to further clarify the authority on which it has been made insofar as it relates to contractors, incorporating my advice as set out above.

I note that the Committee also queried whether the matters dealt with in the Determination would be more appropriately addressed by parliamentary enactment. ACMA has the authority to provide exemptions of this kind through determinations, rather than through primary legislation, as the scope of section 27 is very specifically targeted to critical defence, law enforcement and emergency management purposes. Instead of providing a broad exemption for all such purposes, the Act requires consideration by ACMA and further parliamentary scrutiny before an exemption applies. Providing ACMA with the exemption power in section 27, which can only be exercised by way of legislative instrument, enables swifter and more agile regulation of exemptions as the need arises in different situations, while retaining Parliament's oversight of the delegated legislation and its capacity to address any potential overreach.

In the case of the Determination, the growth in the use of unmanned aircraft (drones) has increased significantly in recent years. The Determination provides police forces with exemptions to parts of the Act to enable the use of devices that can disrupt and disable drones. This is a very specific purpose for which the exemption has been granted, that could not have been reasonably anticipated at the time the Act was drafted.

Thank you for bringing the Committee's concerns to my attention. I hope the information in this letter is of some help.

Yours sincerely

Paul Fletcher

15 / 2 / 2021



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

25 February 2021

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Via email: dlo@communications.gov.au

Dear Minister,

Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 [F2020L01296]

Thank you for your response of 15 February 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 24 February 2021. On the basis of your advice and your undertaking to amend the explanatory statement to the instrument, the committee has concluded its examination of the instrument.

In light of this, the committee has resolved to withdraw the disallowance notice in place on the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Ferravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation