

Legislative Instruments Act 2003

Section 26 – Explanatory Statement

Radiocommunications (Frequency Assignment Certificates) Determination 2014, made under the Radiocommunications Act 1992

Issued by the Australian Communications and Media Authority

Purpose

In August 2014 the Australian Communications and Media Authority (the **ACMA**) made the *Radiocommunications (Frequency Assignment Certificates) Determination 2014* (the **Instrument**). The Instrument revokes and replaces the *Radiocommunications (Frequency Assignment Certificates) Determination 2003* (the **2003 Instrument**) without making any significant changes to the regulatory arrangements created by that 2003 Instrument.

This has occurred because the 2003 Instrument was due, on 1 April 2015, to “sunset” (ie. automatically be repealed) under the provisions of Part 6 of the *Legislative Instruments Act 2003* (the **LIA**). Following review, and consultation as described below, the ACMA formed the view that the 2003 Instrument was operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework. Accordingly, the ACMA has remade the 2003 Instrument by making the Instrument, without any significant changes, so that its on-going effect is preserved.

Legislative Provisions

Part 5.4 of the *Radiocommunications Act 1992* (the **Act**) empowers the ACMA to create an accreditation scheme. In particular, section 266A of the Act provides that the ACMA may, by written instrument, determine the conditions that apply to the issue by an accredited person of a certificate under the Act.

The Instrument is made under section 266A and is a legislative instrument for the purposes of the LIA.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make a legislative instrument, the power shall be construed to include a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument. The Instrument revokes the 2003 Instrument under this power.

Background and Operation

Approximately 90% of radiocommunications certification work is performed by accredited persons. One of the benefits of the accreditation process is that it contributes to an efficient, market-based solution for frequency coordination and emission level management.

The certificates that accredited persons may issue include Frequency Assignment Certificates (**FACs**) issued under subsection 100(4A) of the Act, relating to the operation of radiocommunications transmitters and receivers under apparatus licensing arrangements.

Both accredited persons and ACMA staff issue FACs in support of the apparatus licensing regime. These arrangements have been successful, and largely unchanged, since the mid-1990s.

The new Instrument is designed to maintain, and to not disrupt, the current arrangements which are well understood by industry stakeholders, particularly accredited persons and persons who rely on certificates issued by them.

Consultation

Subsection 17(1) of the LIA requires that before the ACMA makes a legislative instrument it must be satisfied that any consultation that the ACMA considers is appropriate and that is reasonably practicable to undertake has been undertaken.

In this case the ACMA consulted publicly between 4 February 2014 and 14 March 2014 by means of a consultation paper published on its website. That paper explained the sunseting process and the ACMA's preliminary view that the existing arrangements should be saved from automatic repeal and remade without any significant changes. Interested parties were invited to comment. The ACMA received one submission in response to the consultation paper and took it into account when determining to make the Instrument.

Regulation Impact

Under the Guidance Note *Sunsetting Legislation* published by the Office of Best Practice Regulation (OBPR), streamlined administrative processes apply to sunseting legislative instruments. As the ACMA has determined that the 2003 Instrument was fit for purpose, and should be remade without any significant changes, and has certified those matters to OBPR, no Regulation Impact Statement is required.

Documents Incorporated in this Instrument by Reference

The following documents are incorporated by reference in the Instrument:

- The *Radiocommunications (Accreditation – Prescribed Certificates) Principles 2014*
- The *Radio Regulations* of the International Telecommunication Union (ITU)
- The *ITU-R Recommendations* published by the ITU.¹
- Procedural documents that meet the definition of any document published by the ACMA, setting out spectrum management objectives, or procedures to achieve those objectives, which that are relevant to the Instrument. Procedural documents include:
 - Radiocommunications Assignment and Licensing Instructions
 - Policy Information Papers
 - Business Operating Procedures
 - Advisory Guidelines

Legislative instruments mentioned can be found on the Australian Government's ComLaw website at: <http://www.comlaw.gov.au/Home>.

The *Radio Regulations* and *ITU-R Recommendations* can be obtained on the International Telecommunication Union website at: <http://www.itu.int/en/Pages/default.aspx>.

Procedural documents can be found on the ACMA's website at: <http://www.acma.gov.au/>.

¹ Under subsection 314A(2) of the Act, an instrument under the Act may make provision in relation to a matter by applying, adopting or incorporating matter contained in any other instrument or writing whatever, as in force or existing at a particular time, or as in force or existing from time to time, even if the other instrument or writing does not yet exist when the instrument under the Act is made.

Statement of Compatibility with Human Rights

As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, a Statement of Compatibility with Human Rights has been prepared by the ACMA and is attached as Attachment A.

NOTES ON THE INSTRUMENT

Section 1 Name of Determination

Section 1 provides that the name of the Instrument is the *Radiocommunications (Frequency Assignment Certificates) Determination 2014*.

Section 2 Commencement

Section 2 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 Revocation of previous Determination

Section 3 provides that the 2003 Instrument is revoked.

Section 4 Interpretation

Section 4 defines various terms which are used in the Instrument.

Section 5 Conditions to be met before certificates are issued

Section 5 provides for certain matters that affect when and how a FAC may be issued. For example:

- The FAC must be consistent with the Act, spectrum plan, relevant frequency band plans and with any procedural documents issued by the ACMA such as Radiocommunications Assignment and Licensing Instructions.
- The accredited person who is issuing the certificate must believe on reasonable grounds that the radiocommunications device to which the certificate relates is one for which the ACMA would issue an apparatus licence for operation of the device on the terms set out in the certificate as to frequency, constancy, location and technical conditions.
- The accredited person must have regard to specified matters including whether there would be an adverse effect on licensed radiocommunications because of the proposed operation of the device to which the certificate relates.
- The accredited person must first consult with the ACMA before issuing the certificate in particular circumstances such as when, for example, the accredited person believes that the device may fall within the “special circumstances” set out in paragraph 105(2)(b), 153P(2)(e) or 153P(3)(d) of the Act.

Section 6 Certification in circumstances in which conditions are met

Section 6 requires the accredited person to state in each certificate that they issue that:

- the operation of the relevant device will satisfy relevant conditions that are applicable under section 5; and
- they reasonably believe that the device is one for which the ACMA would issue an apparatus licence.

Section 7 Certificates not to include false or misleading statements

Section 7 prohibits the issue of a certificate that includes false or misleading statements.

Section 8 Records to be kept

Section 8 requires the accredited person to keep certain records about each certificate they issue for 5 years and to make them available to the ACMA upon request. The records are:

- the interference management criteria used in issuing the certificate;
- the method used to apply those criteria; and
- the rationale for the use of the criteria and the method.

Section 9 Keeping insurance policy

Section 9 only applies if the issuer of the certificate is not issuing it in government service. A person issuing a certificate other than in government service must be insured for the activity. Because of the definition of **insurance policy** in section 4, the insurance must be for at least \$2 million and must cover the accredited person for any loss or damage caused by their negligence when issuing a certificate or otherwise acting as an accredited person. The accredited person must be covered by an insurance policy that is current and commences when the accredited person first issues a certificate and ends on the earlier of the date the accredited person ceases to be accredited or the date which is 5 years after the date when the accredited person last issues a certificate.

Section 10 Deed of Indemnity

Section 10 provides that whether or not the person is in government service, they must have entered into an approved Deed of Indemnity when they issue a certificate. The deed is given by the relevant government body if the person is in government service or by the accredited person if the person is not in government service. The Deed of Indemnity is approved and published by the ACMA under the *Radiocommunications (Accreditation – Prescribed Certificates) Principles 2014*. The Deed indemnifies the ACMA and its officers, staff and other agents in relation to accreditation matters undertaken by the accredited person.

Section 11 Information in certificate (general)

Section 11 requires the issuer of the certificate to state in it whether it was issued in government service.

Section 12 Additional information in certificate

Section 12 only applies if the issuer of the certificate is not issuing it in government service. Where it does apply, the first certificate issued by the accredited person must attach documentary evidence of the existence of the necessary insurance policy (such as a certificate of currency). Subsequent certificates need only state the reference number and date of expiry of the insurance policy. If the insurance policy is changed or renewed then the first certificate issued after the change or renewal must again have attached to it the certificate of currency or other documentary evidence of the existence of the changed or renewed policy.

Attachment A

Statement of Compatibility with Human Rights

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

Radiocommunications (Frequency Assignment Certificates) 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 *Radiocommunications (Frequency Assignment Certificates) Determination 2014* (the **Instrument**) is made under section 266A of the *Radiocommunications Act 1992* (the **Act**). It determines the conditions which apply to the issue of frequency assignment certificates issued under subsection 100(4A) of the Act. Further details about the Instrument appear in the Explanatory Statement for the Instrument.

Human rights implications

The Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Instrument is compatible with human rights as it does not raise any human rights issues.

Australian Communications and Media Authority