

# EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

*Radiocommunications Act 1992*

## ***Radiocommunications (Conditions of Frequency Assignment Certificates – Apparatus Licences) Determination 2021***

### **Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Conditions of Frequency Assignment Certificates – Apparatus Licences) Determination 2021 (the instrument)* under subsection 266A of the *Radiocommunications Act 1992 (the Act)* and subsection 33(3) of the *Acts Interpretation Act 1901 (the AIA)*.

Subsection 266A of the Act provides that the ACMA may, by legislative instrument, determine the conditions that are to apply in relation to the issuing of a certificate under the Act.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including 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.

### **Purpose and operation of the instrument**

Schedule 5 to the *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020 (the Reform Act)* will make a series of amendments to the Act, including to Part 5.4, in relation to accreditation and the role of accredited persons.

The Accredited Persons scheme (**the AP scheme**) was established in 1996 by one of the ACMA's predecessor agencies, the Australian Communications Authority. The broad objective of the scheme was to improve the efficiency of spectrum management by devolving specific activities to accredited persons. Accredited persons perform frequency assignment, coordination and registration activities, namely:

- the issue of Frequency Assignment Certificates (**FACs**), which state that the operation of a radiocommunications device on a proposed frequency would satisfy any conditions set out in a determination made by the ACMA; and
- the issue of Interference Impact Certificates, which state that the operation of a radiocommunications device proposed to be registered in relation to a spectrum licence satisfies any conditions set out in a determination made by the ACMA.

The AP scheme is a critical element of the ACMA's licensing framework. The technical coordination and frequency assignment required for approximately 98% of all apparatus licences issued by the ACMA is undertaken by accredited persons.

At the time the instrument was made, the *Radiocommunications (Accreditation – Prescribed Certificates) Principles 2014 (the Accreditation Principles)*, made under section 266(1) of the Act, specified the matters for which the ACMA may accredit persons.

The ACMA issues apparatus licences under section 100 of the Act. Subsection 100(4A) provides that the ACMA, in deciding whether to issue an apparatus licence, may have regard to an FAC issued by an accredited person stating that the operation of a device under a licence, in specified circumstances, will satisfy any conditions that are required to be satisfied under a determination made under section 266A of the Act.

Prior to the instrument being made, the *Radiocommunications (Frequency Assignment Certificates) Determination 2014* (**the FAC Determination**), made under section 266A of the Act, determined the conditions that were to apply in relation to a FAC.

The Reform Act amends the Act so there is a new subsection 266(1), which enables the ACMA to make the *Radiocommunications Accreditation (General) Rules 2021* (**the Accreditation Rules**). The Accreditation Rules replace the Accreditation Principles.

Section 266A of the Act, under which the instrument is made, is unchanged by the Reform Act. However, the FAC Determination contained references to the Accreditation Principles, and needed to be amended to refer instead to the Accreditation Rules. It is also convenient and appropriate that some matters dealt with in the FAC Determination now be dealt with by the Accreditation Rules. Specifically, statements to be included in FACs, and record keeping requirements, are now included as conditions of accreditation in the Accreditation Rules. Accordingly, these matters are no longer required to be included in the FAC Determination. The ACMA has therefore decided to revoke the FAC Determination and make the instrument. Apart from the removal of certain content that is now included in the Accreditation Rules, there are no substantive differences between the instrument and the FAC Determination.

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 and legislative instruments:

- the Accreditation Rules;
- the Act;
- frequency band plans made by the ACMA under section 32 of the Act;
- licence condition determinations made by the ACMA under section 110A of the Act;
- spectrum plans made by the ACMA under section 30 of the Act.

The Acts and legislative instruments listed above can be accessed, free of charge, from the Federal Register of Legislation: [www.legislation.gov.au](http://www.legislation.gov.au)

The instrument also incorporates by reference procedural documents that relate to the issue of FACs, published by the ACMA. These procedural documents are available, free of charge, from the ACMA's website: [www.acma.gov.au](http://www.acma.gov.au).

In accordance with section 314A of the Act, each of the above Acts, instruments and documents is incorporated as in force from time to time.

### **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.

Public consultation was conducted on the instrument from 9 March 2021 to 6 April 2021. A consultation paper and the draft instrument, along with other draft instruments related to the AP scheme, were published on the ACMA website and key stakeholders were invited to comment. Nine submissions were received. The majority of issues raised in submissions did not involve changes to be

made to the instrument, but involved matters of operational practice for the ACMA in relation to the AP scheme.

The ACMA made some minor changes to the instrument in response to internal consideration after consultation, to ensure that FACs state that devices to be operated under apparatus licences would be consistent with determinations made under section 110A of the Act. Such determinations impose licence conditions on classes of apparatus licences, or on all apparatus licences.

### **Regulatory impact assessment**

The Office of Best Practice Regulation (**OBPR**) has confirmed that the [Review of the Radiofrequency Spectrum Management Framework](#) undertaken by the then Department of Communications and the Arts (**the Department**), in conjunction with the ACMA, and certified by the Department, meets the requirements of a Regulation Impact Statement (**RIS**).

OBPR advised the ACMA that, for instruments which are designed to maintain existing arrangements under the Act, and which are implemented as part of the implementation of the Reform Act, no further RIS is required so long as the ACMA provided a copy of the instrument to OBPR before it was made (OBPR ID 43339). The ACMA provided a copy to OBPR on 1 June 2021.

### **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 below has been prepared to meet that requirement.

### ***Overview of the instrument***

The Reform Act amends Part 5.4 of the Act, in relation to accreditation. It repeals or amends some provisions that empower the ACMA to make legislative instruments governing the accreditation of persons, and inserts new provisions giving the ACMA new powers.

The instrument is part of the legislative framework for the AP scheme. Authorised persons conduct the majority of the technical coordination required for the issue of apparatus licences by the ACMA.

The instrument specifies the conditions that operation of a radiocommunications device must meet for an authorised person to issue an FAC in relation to the device. The instrument impacts accredited persons and potential and current apparatus licensees who require the services of an accredited person.

The instrument is necessary as a consequence of the changes made by the Reform Act to the accreditation provisions of the Act.

### ***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 does not engage any of those rights or freedoms.

## ***Conclusion***

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

## **Notes to the *Radiocommunications (Conditions of Frequency Assignment Certificates – Apparatus Licences) Determination 2021***

### **Part 1–Preliminary**

#### **Section 1      Name**

This section provides for the instrument to be cited as the *Radiocommunications (Conditions of Frequency Assignment Certificates – Apparatus Licences) Determination 2021*.

#### **Section 2      Commencement**

This section provides for the instrument to commence at the later of the commencement of the *Radiocommunications Accreditation (General) Rules 2021 (Accreditation Rules)*, or the day after the day the instrument 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      Authority**

This section identifies the provision of the Act that authorises the making of the instrument, namely section 266A of the *Radiocommunications Act 1992 (the Act)*.

#### **Section 4      Repeal of the *Radiocommunications (Frequency Assignment Certificates) Determination 2014***

This section provides that the *Radiocommunications (Frequency Assignment Certificates) Determination 2014* (F2014L01193) is repealed.

#### **Section 5      Definitions**

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

#### **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.

### **Part 2–Conditions**

#### **Section 7      Application of Part**

This section provides that each section of Part 2 of the instrument sets out a condition to be satisfied by operation of a device under a proposed apparatus licence, for the purposes of subsection 100(4A) of the Act. A frequency assignment certificate issued by an accredited person under subsection 100(4A) must state that each of these conditions would be satisfied.

## **Section 8      Consistency with Act, instruments and procedural documentation**

Section 8 sets out a condition requiring devices, to be operated under a proposed apparatus licence, to be operated consistently with legislation, legislative instruments and ACMA procedures.

In all cases, operation of the device must be in accordance with the Act. Except where doing so would be inconsistent with the Act or any legislative instrument made under the Act, devices must also be operated consistently with any procedural document specified in the FAC that applies to the frequency or the frequency channel on which the device would operate. If there is no applicable procedural document, then (to the extent that to do so would not be inconsistent with the Act), the device must be operated in accordance with the interference management criteria devised and used by the accredited person and recorded by the person in accordance with the Accreditation Rules.

Devices operated under an apparatus licence must also be operated consistently with the following legislative instruments made by the ACMA: the spectrum plan, any applicable frequency band plan, and any applicable condition specified in a determination made under subsection 110A(1) or (2) of the Act. Special rules apply where the apparatus licence is of a kind mentioned in subsection 104(1) of the Act (which relates to licences granted for purposes relating to a significant event or otherwise in the public interest). In the case of those licences, compliance with the spectrum plan, any applicable frequency band plan, and any applicable condition specified in a determination made under subsection 110A(1) or (2) of the Act is not required if the accredited person has consulted with the ACMA before issuing the FAC.

## **Section 9      Belief that ACMA would issue the licence**

This section sets out a condition in relation to the operation of a device under a proposed apparatus licence. The accredited person issuing an FAC in relation to the licence must believe on reasonable grounds that the ACMA would issue the apparatus licence.

## **Section 10      Special cases – where spectrum licences planned or issued**

Section 105 of the Act places limitations on the power of the ACMA to issue apparatus licences in spectrum covered by a marketing plan, and in spectrum covered by spectrum licences. The ACMA must not issue such an apparatus licence unless an exception applies.

Subsection 10(1) of the instrument provides that, for devices operated under apparatus licences proposed to be issued in such spectrum, the accredited person must believe on reasonable grounds that the ACMA would issue an apparatus licence for the device in accordance with an exception in subsection 105(3) of the Act. Consultation with the ACMA is required in order for the accredited person to be able to form such a belief (subsection 10(2) of the instrument).

Section 153P of the Act places limitations on the power of the ACMA to issue apparatus licences in spectrum (**declared spectrum**) covered by a spectrum re-allocation declaration made under section 153B, during the re-allocation period specified in the declaration unless an exception applies.

Subsection 10(3) of the instrument provides that, for devices operated under apparatus licences proposed to be issued in declared spectrum, the accredited person must believe on reasonable grounds that the ACMA would issue an apparatus licence for the device in accordance with an exception in subsection 153P(2) of the Act. Again, consultation with the ACMA is required in order for the accredited person to be able to form such a belief (subsection 10(4) of the instrument).