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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**RADIOCOMMUNICATIONS LEGISLATION AMENDMENT (REFORM AND
MODERNISATION) BILL 2020**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications, Cyber Safety and the Arts
the Honourable Paul Fletcher MP)

RADIOCOMMUNICATIONS LEGISLATION AMENDMENT (REFORM AND MODERNISATION) BILL 2020

OUTLINE

The Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (the Bill) will amend the *Radiocommunications Act 1992* to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management.

The technological landscape has changed significantly since the original legislative framework was first introduced in 1992. Regulatory arrangements for spectrum management must not only respond to these changes, but also be flexible enough to adapt to future innovation and changing demand for spectrum. The Bill is designed to add flexibility to the legislative framework, remove unnecessary prescription and legislative barriers, and improve processes, helping the framework remain fit for purpose in a rapidly changing environment.

The primary measures in the Bill will:

- clarify the object of the Act and the roles of the Minister and the Australian Communications and Media Authority (ACMA): the Minister will have less involvement in day-to-day spectrum management decisions that are more properly the responsibility of the regulator, and will have the power to issue Ministerial policy statements to guide ACMA in the performance of its spectrum management functions. In addition, ACMA will also be required to prepare annual work programs to provide transparency around how it will perform its spectrum management functions
- streamline spectrum allocation and re-allocation processes: ACMA will have greater flexibility to develop fit-for-purpose allocation arrangements in order to bring spectrum to market within shorter timeframes where this is appropriate
- improve flexibility and reduce regulatory barriers between licence types: the maximum licence term for both apparatus licences and spectrum licences will be extended to 20 years, with less regulatory barriers and more flexibility in the allocation process, and clearer processes governing renewal of licences
- better reflect modern spectrum needs and supply chains: device supply schemes and equipment regulation will be streamlined, and ACMA will be empowered to provide new exemptions in appropriate circumstances to facilitate testing, development and manufacturing of otherwise controlled devices
- introduce a modernised compliance and enforcement regime with more graduated enforcement mechanisms for breaches of the framework: this will give ACMA a greater range of options beyond the institution of criminal proceedings.

FINANCIAL IMPACT STATEMENT

It is anticipated that the Bill will have no financial impact.

REGULATORY IMPACT STATEMENT

The Spectrum Review was certified by the then Department of Communications and the Arts as an independent review for the purposes of assessing regulatory impacts.

The amendments in this Bill are intended to give effect to the recommendations of the Spectrum Review as set out in the below comparison table.

These amendments have been developed following consideration of recommendations from the 2015 Spectrum Review. The Spectrum Review has been certified as an independent review for RIS purposes (OBPR ref:19096). These reforms are estimated to result in an annual reduction in regulatory cost savings of \$0.3m.

Comparison table of the 2015 Spectrum Review and the Bill

Spectrum review recommendation	2020 proposal		regulatory cost estimates (\$AUD)
1. Given technological change and increasing demands for spectrum the current legislative framework (the <i>Radiocommunications Act 1992</i>) should be replaced by arrangements that provide for greater market- based activity, including by increasing the opportunity for spectrum holders to share and trade spectrum and simplify regulatory structures, streamline regulatory processes and clarify the role of Government.	a) Establishing a single licensing system based around a limited number of parameters of the licence	<p>In the proposed reforms the multi-licensing system remains, however, the licence types have been brought closer together to achieve the benefits of a single licensing system without the transition costs, so that further consideration can be given to the implementation of a single-licensing system.</p> <p>The reforms have clarified the conditions that must be met in order for a licence to be issued or renewed, and improved and streamlined the current regulatory barriers between the licence types so that there is more flexibility, consistent with the overall recommendation to streamline regulatory processes.</p> <p>For example, under the proposed reforms:</p> <ul style="list-style-type: none">the maximum licence term for both apparatus licences and spectrum licences will be extended to 20 yearsregulatory barriers that limit the issuance of both spectrum and apparatus licences in certain circumstances are to be removed, to enable ACMA to issue the most appropriate licence in the circumstances (as they would if there was only one licence type)the conditions that must be met in order for a licence to be issued or renewed have been more clearly stated, and consistent between licence types. This can be seen in the criteria for renewal for long-term apparatus and spectrum licences including an evaluation of the public interest.	-726,000
	b) Integrating the management of broadcasting spectrum	Not applicable – not being progressed at this stage.	

	<p>c) Clarifying the roles and responsibilities of the Minister and ACMA under the framework</p>	<p>In the proposed reforms the Minister's role has been clearly defined so that the Minister will have more involvement in the setting of policy and less involvement in spectrum management decisions that are more properly the responsibility of the regulator. The proposed reforms also include requirements for ACMA to provide greater transparency around its planning and management functions. There are avenues for the Minister to intervene where necessary.</p> <p>For example under these reforms the Minister will have the power to issue Ministerial policy statements to guide ACMA in the performance of its spectrum management functions. In addition, ACMA will also be required to prepare annual work programs to provide transparency around how it will perform its spectrum management functions, and then report on how it achieved the work program and how it took into account any Ministerial Policy Statements.</p>	NIL
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	<p>d) Providing for transparent and timely spectrum allocation and reallocation processes and methods</p>	<p>In the proposed reforms ACMA will have greater flexibility to develop fit-for-purpose allocation arrangements in order to bring spectrum to market within shorter timeframes where this is appropriate. These amendments are designed to streamline allocation processes and remove legislative barriers to replanning. This has been achieved through the removal of some constraints in the spectrum allocation and reallocation processes, particularly around sequences of activities and timeframes and improved flexibility in the process so that it can adapt to market changes.</p> <p>For example, in the proposed reforms there is now a power for ACMA to directly allocate spectrum licences. Direct allocation will serve to partially replace the current conversion processes and will also provide a more straightforward process than is currently available in the legislation, for use in situations where it is preferable to allocate a spectrum licence to a particular person. Similarly, for Spectrum Re-allocations Declarations, the proposed reforms will empower ACMA to issue these declarations, whereas it would previously make recommendations to the Minister to issue a declaration, removing unnecessary prescription in the steps that must be taken to re-allocate spectrum to meet the needs of spectrum users.</p>	NIL
	<p>e) Providing more opportunities for spectrum users to participate in spectrum management</p>	<p>Accreditation schemes play an important role in helping ACMA perform its spectrum management functions. The accreditation scheme in the Act allows ACMA to outsource certain kinds of administrative or technical work to qualified individuals, freeing up ACMA to focus on other regulatory work and creating new business opportunities within the radiocommunications industry.</p> <p>Given the success of this scheme and the recommendation of the Spectrum Review that spectrum users be given more opportunities to participate in spectrum management, these amendments propose to expand the scope of the accreditation scheme, and provide ACMA with the flexibility to adopt similar models to other areas of the Act.</p>	NIL

	f) Streamlining device supply schemes	<p>The proposed reforms improve technical regulation and streamline device supply schemes by removing prescriptive legislative requirements and authorising ACMA to develop schemes in line with risk. They also expand relevant provisions in the Act to enable ACMA to make rules or principles that will prevent devices entering the market that are likely to cause interference or harm to human health and to mitigate the risk from harmful equipment that has entered the market.</p> <p>For example, currently ACMA is not able to impose obligations such as record-keeping rules on persons in the supply chain who are not manufacturers, importers or agents of importers, even in situations where intermediaries are the most appropriate entity to regulate. The amendments would grant ACMA greater flexibility in identifying who in a supply chain is responsible for device compliance.</p>	NIL
	g) Improving compliance and enforcement by introducing proportionate and graduated enforcement mechanisms for breaches of the legislative framework	<p>The proposed reforms introduce a modernised compliance and enforcement regime with more graduated enforcement mechanisms for breaches of the framework: this will give ACMA a greater range of options beyond the institution of criminal proceedings. This includes information gathering powers intended to support ACMA in carrying out its spectrum management functions, including spectrum planning, interference management, monitoring compliance and targeting its education initiatives, all of which can be constrained by limited access to information.</p> <p>For example, the proposed reforms adopt all of the powers in the Regulatory Powers Act (monitoring, investigation, civil penalty provisions, infringement notices, enforceable undertakings and injunctions), as well as a number of additional mechanisms, including remedial directions, forfeiture notices and public warning notices. The criminal offences have been amended to take account of developments in policy and contemporary practice on the framing and operation of Commonwealth offences.</p>	448,000

	h) Ensuring that the rights of existing licence holders are not diminished in the transition to the new framework	<p>To ensure processes underway at the time the reforms commence are able to continue without disruption, the Bill contains transitional provisions that:</p> <ul style="list-style-type: none"> • provide that spectrum re-allocation declarations and any marketing plans that are currently in force will continue to apply, so that major spectrum allocations currently underway are not disrupted • allow any ongoing processes to convert apparatus licences to spectrum licences to continue where an offer of a spectrum licence has been made prior to the commencement • allow existing applications for the renewal of an apparatus licence to be continued under the existing arrangements • only require new licences to contain a renewal statement and a renewal application period statement • allow the existing standards and compliance labelling notices to serve as the initial equipment rules, to give ACMA time to consult with industry on the content and operation of the first set of equipment rules to be issued under the reforms. <p>The Department and ACMA will continue to provide advice to stakeholders on the implementation of the reforms, and will work together on transitional plans to support a smooth commencement of the new arrangements.</p>	NIL
TOTAL:			-278,000

<p>2. Recognising that how public sector agencies account for and deal with assets is a separate policy matter for Government</p> <ul style="list-style-type: none"> i. requiring public sector agencies that hold spectrum to regularly report the value of their holdings ii. permitting agencies to either lease or sell the spectrum and retain the benefit of doing so. 	<p>Not applicable – this recommendation was addressed in the development of the Commonwealth Held Spectrum Review and the subsequent publishing of the Australian Government Held Spectrum Report (which is designed to be updated every two years).</p>
<p>3. That the Department review the arrangements for pricing of spectrum (including exemptions, concessions, administrative charges and taxes) so that these are consistent, transparent and support efficient use in secondary markets.</p>	<p>Not applicable – this recommendation was addressed through the Spectrum Pricing Review (the recommendations of which were accepted by Government in March 2018).</p>

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Radiocommunications Legislation Amendment (Reform and Modernisation)

Bill 2020

This Bill 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*.

Schedule 1 – Object

Schedule 1 of the Bill amends the object of the Act to clarify the object of the Act and streamline the sub-objects. The Bill establishes that the primary object of the Act is to promote the long-term public interest derived from the management of the spectrum. The Bill provides three sub-objects that are of equal importance that are necessary to achieve the object of the Act.

Schedule 1 engages the right to an adequate standard of living and to the continuous improvement of living conditions as contained in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), insofar as it reforms and modernises the legislative framework necessary to enable the realisation of the social and economic benefits possible from the use of spectrum in a rapidly-changing technological landscape.

Human rights implications and conclusion

This Schedule is compatible with Article 11(1) of the ICESCR.

Schedule 2 – Policy statements and work programs

Schedule 2 of the Bill provides for the Minister to issue Ministerial policy statements (MPS) which ACMA must have regard to in exercising its spectrum management functions and powers. The power to make an MPS is a new mechanism that is intended to enable the Minister to provide high-level policy guidance to ACMA about the Government's policies for spectrum management. This mechanism complements the reduction in the Minister's process-based regulatory decision-making functions, and the overall more strategic role conferred on the Minister by the amendments in this Bill.

The Schedule requires ACMA to publish an annual work program covering a minimum five-year period, setting out a detailed work program for the upcoming financial year and an outlook over the five-year time horizon. ACMA would be required to consult the Minister and undertake any other consultation that it considered appropriate and reasonable to undertake before finalising an annual work program.

Human rights implications and conclusion

This Schedule does not engage any applicable human rights.

Schedule 3 – Licences

Schedule 3 relates to the licensing of spectrum, including allocation processes, re-allocation processes, the renewal of spectrum licences and apparatus licences, and the duration of licences.

The Schedule proposes amendments to the Act that would give ACMA greater responsibility over day-to-day allocation and re-allocation processes, while retaining the Minister's power to direct ACMA when appropriate. Other key changes proposed by this Schedule to the Bill aim to improve processes and methods include:

- the repeal of designation and conversion processes;
- a new power to directly allocate licences;
- changes to allocation limits in price-based allocation processes;
- simplifying the process for re-allocating encumbered spectrum.

The following discussion highlights provisions in the Schedule that deal with acts or omissions that may affect an individual but do not amount to engaging applicable human rights.

ACMA may set allocation limits on a part or the aggregate of parts of the spectrum that may be used by a person (or group of persons) as a result of an allocation process, taking into account the whole of a potential licensee's spectrum holdings. ACMA may also be able to have regard to aggregate spectrum holdings when deciding whether or not to issue or renew an apparatus licence outside of section 106 allocation processes.

ACMA may issue, vary and revoke spectrum re-allocation declarations while providing existing spectrum users with appropriate notice and opportunities for input.

As there is no presumption that a further licence will be issued, the renewal statement will serve to clarify from the moment of issuing the initial licence whether no further licence will be issued, whether a further licence may be issued at the discretion of ACMA or whether there are any conditions that will need to be met in order for ACMA to consider issuing a further licence.

ACMA has the discretion to offer licensees a further licence with different conditions to those in the licence it succeeds, or for a period of time different to that in the licensee's application. If an application is refused or if ACMA decides to issue a further licence but on different conditions, ACMA must issue a notice of decision and a statement of reasons to the applicant, providing transparency. Both these decisions will also be reviewable.

Human rights implications and conclusion

This Schedule does not engage any applicable human rights.

Schedule 4 – Equipment

Schedule 4 confers certain powers on ACMA to make equipment rules that prescribe standards of equipment and impose obligations or prohibitions in relation to equipment. This extends to the operation, supply, offer to supply, possession and/or importation of equipment, labelling and use of protected symbols. The Schedule also gives ACMA the power to issue, vary, revoke or cancel permits, subject permits to conditions and make the

breach of a permit an offence, contravention of the Act or both and subject to the respective criminal penalty or civil penalty. Exceptions apply to certain contraventions.

The Schedule gives ACMA the power to impose interim or permanent bans on equipment on parties involved in the operation, supply, offer to supply, possession and/or importation of the equipment. ACMA also has the power to require the mandatory recall of equipment, and mandatory notification to ACMA in the instance of voluntary recalls of equipment.

The Schedule creates offences and penalties in relation to non-compliance with bans and recalls on equipment. In applying these offences and civil penalties, the Schedule makes presumptions that a person to whom banned equipment is supplied or an offer is made to supply banned equipment intends to operate the equipment.

The Schedule creates an offence and a civil penalty of 500 penalty units (PU) respectively for the contravention of a prohibition or obligation other than a record keeping requirement or permit condition. Contravention of the obligation to keep or retain records attracts a civil penalty of 30 PU while misuse of a protected symbol has a civil penalty of 30 PU.

Non-compliance with an interim ban is subject to a civil penalty of 200 PU while contravention of a permanent ban is an offence with a penalty of 2 years imprisonment and/or a 1000 PU and a contravention attracting a civil penalty of 1000 PU.

Non-compliance with a recall notice is an offence and a contravention each having a penalty of 1000 PU (maximum civil penalty for each day that a contravention continues is 10% of the maximum civil penalty).

The Schedule also sets out a series of contraventions regarding labelling of 100 PU or less.

None of the offences in the Schedule are of strict liability.

The Schedule amends the Act to give a person that has suffered loss or damage an action for damages against a person that has failed to comply with an interim or permanent ban in accordance with the amendment.

Human rights implications and conclusion

Schedule 4 engages the right to the enjoyment of the highest attainable standard of physical and mental health as set out in Article 12 of the ICESCR; and the right to a presumption of innocence and a fair trial/fair hearing - Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Article 12(1) of the ICESCR promotes the right of all individuals to enjoy the highest attainable standard of physical and mental health. This includes the improvement of all aspects of environmental and industrial hygiene (Article 12(2)(b)). While the ICESCR contains no definition of health, the UN Committee on Economic Social and Cultural Rights ('the Committee') provides further guidance, stating that the right to health is not to be understood as a right to be healthy. Accordingly the right also contains entitlements, which include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee's definition is relevant to this Bill, because while the Bill does not explicitly relate to the right of a person to enjoy the highest attainable standard of physical and mental health, the amendments to the regulatory scheme being established in the Bill provide a system of checks and balances necessary to protect human health. The equipment rules are directed towards achieving several objectives including protecting the health or safety of individuals from any adverse effect likely to be attributable to radio

emissions resulting from a reasonably foreseeable use (including a misuse) of radiocommunications transmitters.

The right to the presumption of innocence is one of the guarantees in relation to legal proceedings contained in article 14. It is also a fundamental principle of the common law. The other guarantees are the right to a fair trial and fair hearing, and minimum guarantees in criminal proceedings, such as the right to counsel and not to be compelled to self-incriminate.

The UN Human Rights Committee has stated that the presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

The Schedule creates offences and civil contraventions that contains a presumption and put an evidential burden on the accused to rebut the presumption. Under international human rights law, a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused. The purpose of the reverse onus provision would be important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.

In this instance, it would be difficult for the prosecution to establish the intention of a person supplied or offered to be supplied with banned equipment in terms of whether or not they intend to operate the equipment in circumstances where the equipment is the subject of an interim or permanent ban for reasons permitted under the proposed legislation. The proposed legislation allows the defendant to rebut the presumption by adducing or pointing to evidence that suggests a reasonable possibility that the presumption does not apply.

Conclusion

This Schedule is compatible with the human right it engages, the measures in the amendments do not unnecessarily, unreasonably or disproportionately limit, the right to the enjoyment of the highest attainable standard of physical and mental health, the presumption of innocence and the right to a fair trial.

Schedule 5 – Accreditation

Schedule 5 expands ACMA's power to devolve functions to accredited persons. The Schedule allows ACMA to develop accreditation rules, determine the conditions of accreditation and the processes and necessary qualifications to be applied in the granting of different categories of accreditation.

Human rights implications and conclusion

Schedule 5 engages the right to work which includes the right of a person to gain their living by work which he or she freely chooses or accepts. The right to work and rights in work is contained in articles 6(1), 7 and 8(1)(a) of the ICESCR. Article 4 of ICESCR provides that countries may subject economic social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The UN Committee has stated that such limitations must be proportional, and must be the least restrictive alternative where several types of limitations

are available, and that even where such limitations are permitted, they should be of limited duration and subject to review.

The accreditation rules may provide for the qualifications and other requirements required before a person can be given the relevant kind of accreditation. To the extent that these requirements restrict the right to work (if at all), they are consistent with the statement of the UN Committee.

Schedule 6 – Compliance and enforcement

Schedule 6 modernises the compliance monitoring and enforcement tools available to ACMA. The Schedule triggers the regulatory powers of Part 2 and Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) including the ability to:

- issue infringement notices
- seek an injunction or other civil penalties
- accept an enforceable undertaking
- give a remedial direction
- issue public warning notices about contraventions of certain provisions of the Act, when it is in the public interest to do so
- use forfeiture notices to seek the voluntary surrender and forfeiture of things involved in the contravention of provisions of the Act
- refer matters for prosecution to seek conviction and criminal penalties
- suspend and/or cancelling licences
- withdraw accreditation and authorisations.

The Bill also provides inspectors appointed under the Act with the following powers in addition to those made available by the triggering of Parts 2 and 3 of the Regulatory Powers Act:

- the power to give directions to a holder of an apparatus licence or a spectrum licence in relation to managing interference with radiocommunications;
- the power to enter premises to adjust transmitters in emergencies;
- the power to direct a person to operate a transmitter;
- the power to require a person to produce an apparatus licence, a spectrum licence, a third party authorisation, a certificate or a permit;
- the power to require a person to produce a copy of a record of an authorisation; and
- the power to require a person to produce a record the retention of which is required by the equipment rules.

The additional regulatory powers and tools give ACMA greater flexibility to address instances of non-compliance and reduce the prevalence of equipment that can be used to cause interference, while also removing the administrative and financial burden of having to conduct lengthy criminal investigations for potentially minor breaches. This will more effectively protect the rights of spectrum users, as well as reduce the need for more coercive enforcement powers to be used in situations where this is not a proportionate

response. Criminal penalties and sanctions will remain available in a limited number of cases, where this is justified by the seriousness of the potential breach. Attachment A is table of the offences and penalties that would be available under the Act.

Human rights implications

Schedule 6 engages the following rights:

- the right to a fair trial/fair hearing - Article 14 of the ICCPR;
- the right to the presumption of innocence - Article 14 (2) of the ICCPR;
- the right to be free from self-incrimination - Article 14(3) of the ICCPR; and
- the right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted - Article 14 (7) of the ICCPR.

Right to a fair trial / hearing

Article 14 of the ICCPR guarantees equality before courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. This guarantee includes respect for the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. Those charged with a criminal offence have the rights set out in Article 14(2) to (7), including the presumption of innocence and the guarantees set out in Article 14(2). Under certain circumstances, a civil penalty can be characterised as 'criminal' for the purposes of the application of Article 14.

New civil penalty provisions proposed to be inserted by Schedule 6 of the Bill provide for civil penalty amounts of 300 PU for contravention of the prohibition to operate or possess a radiocommunications transmitter – a civil penalty of 30 PU applies for the same action in relation to equipment other than a radiocommunications transmitter.

The civil penalty provisions in the Bill are provided as disciplinary alternatives to the punitive or deterrent criminal offences a maximum of 2 years imprisonment and a fine of 1,500 penalty units relating to prohibited conduct for a radiocommunications transmitter. Civil penalties will also enable an effective disciplinary approach to dealing with non-compliance by corporations.

While a criminal penalty is deterrent or punitive, the objectives of these civil penalties are regulatory or disciplinary in nature and apply to a class of persons, licence holders, who can reasonably be expected to be aware of their obligations under the legislation and who have voluntarily sought the approval of the Commonwealth to engage in an activity that is regulated under very clear conditions. Accordingly, the civil penalty provisions in the Bill should not be considered 'criminal' for the purposes of human rights law.

In addition, there are other levels of regulatory actions that can be taken before escalating to civil penalties, including imposition of additional conditions or varying the activities that can be undertaken under the licence, the issuing of directions, giving of infringement notices, the accepting of enforceable undertakings and, if necessary, the revocation of a permit or the licence.

The civil penalty amount of 300 PU is considered justified given the nature of the conduct and will provide the appropriate incentive for those regulated under the Act to comply with regulatory requirements.

Other civil penalty provisions proposed to be inserted by Schedule 6 involve failure by a licence holder to comply with a licence condition other than a record keeping or administrative requirement (100 PU and 20 PU respectively), a remedial direction (50 PU) and a direction relating to authorised persons (30 PU) or notifying authorised persons (20 PU). The Schedule creates a civil penalty of 500 PU for causing interference, disruption or the disturbance of radiocommunications and repeals the existing criminal penalty with a civil penalty of 500 PU for an unauthorised transmission from a foreign vessel in Australia.

The cumulative effect of the nature and severity of the civil penalties in the Bill is unlikely to be considered ‘criminal’ for the purposes of human rights law.

Right to the presumption of innocence

As stated previously, Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

When ‘strict liability’ applies to an offence, the prosecution is only required to prove the physical elements of an offence, not the fault elements, beyond reasonable doubt in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 9.2 of the *Criminal Code*).

Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations. Strict liability offences can be considered a limitation of the presumption of innocence because the defendant can be found guilty without the prosecution being required to prove fault.

Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that removal of the presumption of innocence pursues a legitimate objective and is reasonable, necessary and proportionate to achieving that objective. Whether a strict liability provision impermissibly limits the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for an offence being a strict liability offence.

The Bill proposes to repeal all strict liability offences in the Act.

Right to be free from self-incrimination

Article 14(3)(g) of the ICCPR protects the right of an individual to be free from self-incrimination in the determination of a criminal charge by providing that a person cannot be compelled to testify against him or herself or confess guilt. The common law also recognises the privilege against self-incrimination, which applies unless expressly or impliedly overridden by statute. The privilege against self-incrimination may be subject to permissible limits but any such limitations must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

This Bill limits the right for an individual to be free from self-incrimination where the exercise of this right could seriously undermine the effectiveness of the regulatory scheme and prevent the collection of evidence.

Section 284K in the Schedule abrogates the privilege by providing that a person is not excused from providing information sought under the general powers of inspectors in section 284J on the ground that the production of the document might tend to incriminate the individual in relation to an offence.

Without the abrogation of the right to be free from self-incrimination, the regulatory scheme could be seriously compromised. The public benefit of its removal outweighs the loss of personal liberty.

These limitations of the right to be free from self-incrimination under Article 14(3)(g) of the ICCPR are permissible as protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective, and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

Right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted

Article 14(7) of the ICCPR prohibits an individual from being tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country—commonly known as the prohibition on double jeopardy. This prohibition is limited to proceedings relating to a criminal charge, however it is noted that whether a proceeding is civil or relates to a criminal charge under Article 14(7) is determined by the substance and the effect of the proceedings themselves, rather than their label under domestic law.

The right not to be twice tried or punished for the same offence may be engaged as the Bill permits both criminal and ‘civil’ proceedings (considered criminal for the purposes of international human rights law) to be brought against a person for the same conduct. However, the commencement and conduct of such proceedings is subject to the Regulatory Powers Act.

Schedule 6 provides that criminal proceedings may be commenced against a person after they have been ordered to pay a civil penalty for the same conduct. However, civil proceedings for the same conduct for which criminal proceedings have commenced are stayed and can only be re-instated if the person is not convicted.

Conclusion

This Schedule is compatible with the human right it engages, the measures in the amendments do not unnecessarily, unreasonably or disproportionately limit, the following rights:

- the right to a fair trial/fair hearing - Article 14 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to the presumption of innocence - Article 14 (2) of the ICCPR;
- the right to be free from self-incrimination - Article 14(3) of the ICCPR; and
- the right not to be tried or punished again for an offence for which a person has already been finally convicted or acquitted - Article 14 (7) of the ICCPR.

Schedule 7 – Information gathering powers

Schedule 7 of the Bill inserts Part 5.5A into the Act to confer on ACMA certain information-gathering powers, under which it may require a person to provide information, or produce a document, that relates to the supply or operation of radiocommunications devices and compliance or non-compliance with the conditions of licences. These information gathering powers also enable ACMA to seek information from a person that operates a radiocommunications device under a current licence or a licence that may be issued in the future, to assist ACMA in its spectrum management functions associated with planning the future use of the spectrum.

Human rights implications

Schedule 7 engages the right to be free from self-incrimination - Article 14(3) of the ICCPR.

Article 14(3)(g) of the ICCPR protects the right of an individual to be free from self-incrimination in the determination of a criminal charge by providing that a person cannot be compelled to testify against him or herself or confess guilt. The common law also recognises the privilege against self-incrimination, which applies unless expressly or impliedly overridden by statute. The privilege against self-incrimination may be subject to permissible limits but any such limitations must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

This Bill limits the right for an individual to be free from self-incrimination where the exercise of this right could seriously undermine the effectiveness of the regulatory scheme and prevent the collection of evidence.

Section 284W in the Schedule abrogates the privilege by providing that a person is not excused from providing information sought under the general powers of inspectors in section 284S on the ground that the production of the document might tend to incriminate the individual in relation to an offence.

Without the abrogation of the right to be free from self-incrimination, the regulatory scheme could be seriously compromised. The public benefit of its removal outweighs the loss of personal liberty.

These limitations of the right to be free from self-incrimination under Article 14(3)(g) of the ICCPR are permissible as protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective, and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

Conclusion

This Schedule is compatible with the human right it engages, as the measures in the amendments do not unnecessarily, unreasonably or disproportionately limit, the right to be free from self-incrimination.

Schedule 8 – Miscellaneous

This Schedule includes amendments that apply across the Act, such as ACMA's powers to grant exemptions from penalty provisions, exemptions for Defence related activities and ACMA's ability to use computer assisted decision making, particularly in the renewal of licences. This schedule also extends the exemptions afforded to defence related activities to reflect current operational requirements.

Human rights implications and conclusion

This Schedule does not engage any applicable human rights.

Schedule 9 and Schedule 10– Datacasting Transmitter Licences and Public Inquiries

These Schedules of the Bill repeal provisions that have not been used to date.

Human rights implications and conclusion

These Schedules do not engage any applicable human rights.

Schedule 11 – Duration of Licences

To create greater flexibility across spectrum licences and apparatus licences, the maximum duration for both spectrum licences and apparatus licences will be extended to 20 years. This will help balance the benefits that longer licences can present in some cases (by providing greater certainty and encouraging innovation and investment) with the need to retain flexibility in spectrum management processes (such as by issuing shorter duration licences where appropriate) in order to adapt to changing circumstances.

Human rights implications and conclusion

This Schedule does not engage any applicable human rights.

Conclusion

The Bill is compatible with human rights because it promotes the right to an adequate standard of living and the continuous improvement of living conditions and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Communications, Cyber Safety and Arts
the Hon Paul Fletcher MP

NOTES ON CLAUSES

Clause 1 – Short Title

This clause advises that the short title of the Act will be the *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020*.

Clause 2 – Commencement

This clause provides that the majority of the Act will commence on a single day to be fixed by proclamation by the Governor-General in Council. However, those parts of the Act will commence the day following the expiry of a 6 month period from the day the Act receives the Royal Assent if they have not commenced before that day.

Schedule 11 will also commence on a single day to be fixed by proclamation by the Governor-General in Council, or the day following the expiry of a 6 month period from the day the Act receives the Royal Assent if it has not commenced before that day. However, it may do so independently, on a different date to the other parts of the Act.

The commencement clause also provides for certain provisions to commence in line with the commencement of the *Federal Circuit and Family Court of Australia Act 2020*.

In addition, Part 5 of Schedule 6 is provided to commence the day after the Act receives the Royal Assent, to enable the Australian Communications and Media Authority to put in place arrangements for the commencement of the other provisions.

Clause 3 – Schedules

This clause provides that the Schedules amend or repeal provisions of the legislation referred to in the Schedule, as set out in the items of that Schedule.

SCHEDULE 1—OBJECT

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Section 3

Section 3 provides for the insertion of a new object clause in the Act. The current Act has one primary object, that is, to provide for management of the radiofrequency spectrum, and specifies eight separate aims to be achieved. There is no hierarchy for these aims and so, in the absence of a clear priority, it may reasonably be assumed that all eight aims are to be given equal weighting. However, this would not always be the correct application of the objects provision, and this can lead to conflict and confusion. The 2015 Spectrum Review noted that legislative reform of the spectrum management framework would need to include a review of the objects of the Act, in order to ensure they are appropriate and encourage efficiency, innovation and certainty of investment.

The Bill proposes to repeal Section 3 of the Act and replace it with a new, simpler object, which 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:

- (a) facilitates the efficient planning, allocation and use of the spectrum; and
- (b) facilitates the use of the spectrum for:
 - (i) commercial purposes; and
 - (ii) defence purposes, national security purposes and other non-commercial purposes (including public safety and community purposes); and
- (c) supports the communications policy objectives of the Commonwealth Government.

The new object of the Act puts the promotion of the long-term public interest derived from the use of the spectrum as the key aim in the management of the spectrum. This is currently part of paragraph 3(a) of the Act. This object is intended to allow ACMA to balance many uses of the spectrum as well as broader public policy objectives.

The new object then specifies three aims. While there is no specified hierarchy about the relative importance of these three aims, they all serve the primary object of promoting the long-term public interest derived from the use of the spectrum. They also avoid both the repetition, and the references to the means by which the objects should be pursued, which currently exist in the Act.

The first aim, about efficient planning, allocation and use of the spectrum, will require ongoing assessment of the best use of the spectrum as a finite resource and will enable spectrum uses to adapt to emerging technological and market needs. Considerations around facilitating the efficient use of spectrum would include competition considerations, such as factoring in the role of competition in downstream markets.

The second aim about use for commercial and non-commercial purposes reflects the importance the Act gives to the object of managing the spectrum not only for commercial services that use the spectrum, but also for non-commercial spectrum uses, some of which are the traditional responsibility of governments. These non-commercial purposes could include spectrum uses such as for radio astronomy, or non-commercial fixed wireless and satellite services.

The explicit reference to defence purposes and national security purposes is retained in (b)(ii) from the objects of the current Act to emphasise the ongoing importance of facilitating the use of spectrum for those agencies responsible for Australia's defence and national security.

Unlike "public or community services" as defined in section 10 of the Act, "public safety and community purposes" is a broader expression intended to bear its ordinary meaning. This broader expression is intended to encompass, by way of example only, law enforcement, science services (such as meteorology), and non-commercial fixed wireless and satellite services. The aim of facilitating the use of spectrum for public safety also acknowledges the importance of adequate spectrum being made available for these uses, for example for emergency services. However, the expression is not intended to be limited to any particular kinds of non-commercial purposes, and is intended to extend beyond this list of examples.

The third aim is to support the communications policy objectives of the Government. This can encompass policy objectives specific to radiocommunications, as well as broader communications policy objectives.

Communications policy objectives of the Commonwealth government may be communicated in different forms, such as:

1. Ministerial policy statements (MPS) issued under Part 1.5 of the Bill
2. Statements of expectations given to the regulator by the Government
3. Public statements of communications policy made by government

SCHEDULE 2—POLICY STATEMENTS AND WORK PROGRAMS

Schedule 2 inserts Parts 1.5 and 1.6 into the Act, to provide for Ministerial policy statements and work programs.

Part 1.5 provides for the Minister to issue Ministerial policy statements (MPSs) by way of notifiable instrument. The power to make an MPS is a new mechanism that is intended to enable the Minister to provide high-level policy guidance to ACMA about the Government's policies for spectrum management. Matters that the Minister may wish to address in an MPS could include:

- criteria to be considered by ACMA when setting allocation limits
- guidance on what is considered to be in the long-term public interest, in line with the object of the Act, and considerations to be taken into account by ACMA in making renewal decisions or when applying a public interest test
- guidance on direct allocation of spectrum licences
- guidance on the exercise of any or all of ACMA's other new powers under these amendments.

This mechanism complements the reduction in the Minister's process-based regulatory decision-making functions, and the overall more strategic role conferred on the Minister by the amendments in this Bill.

ACMA will be required to have regard to any relevant MPSs in performing its spectrum management functions, and exercising its spectrum management powers, and report on this in its annual reports. ACMA may also reflect how it proposes to have regard to any relevant MPSs in its work program (as set out in Part 1.6).

This Part, as well as Part 1.6 and the information-gathering powers contained in Schedule 7, give effect to recommendation 1(c) of the Spectrum Review: to clarify the roles and responsibilities of the Minister and ACMA. This Bill helps establish Ministerial intervention as a lever for strategic policy intervention, rather than being process-driven.

MPSs are complementary to the Minister's ability to make a stronger regulatory intervention by giving ACMA a direction under section 14 of the ACMA Act.

Part 1.6 of the Bill will require ACMA to determine, at least once each financial year, a work program in relation to its spectrum management functions and spectrum management powers. The annual work program will cover at least a five-year forward horizon, with a detailed work program for the upcoming financial year and an outlook over the five-year time horizon, and is intended to provide the Minister and spectrum users with an early indication of new and changing priorities, spectrum planning issues and anticipated significant decisions.

This Part builds on ACMA's five-year spectrum outlook, which it started publishing in 2009. The annual work programs will maintain the transparency of forward planning of spectrum management for spectrum users and the Government.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Section 5

Item 1 of Schedule 2 of this Bill adds relevant definitions to Section 5 of the Act, including a definition of MPSs, and clarifying what is meant by ACMA's spectrum management functions and spectrum management powers.

Item 2—At the end of Chapter 1

Item 2 inserts Parts 1.5 and 1.6 into the Act, to provide for policy statements and work programs.

Part 1.5—Ministerial Policy Statements—Sections 28B and 28C

Item 2 of Schedule 2 of this Bill adds a new Part 1.5 to the Act. This Part enables the Minister to set out statements of policy to which ACMA must have regard in performing its spectrum management functions or exercising its spectrum management powers, in the form of Ministerial policy statements. A policy could be high level, including, for example, priorities for the management, allocation or use of the spectrum, or other strategic policies relevant to ACMA's spectrum management functions and powers generally. The policy could also be quite specific to a particular spectrum management function or power, such as a policy of the Government on appropriate kinds of licence conditions that should be included to manage interference in a particular band.

An MPS will be made by notifiable instrument. A notifiable instrument is required to be registered on the Federal Register of Legislation (accessible at www.legislation.gov.au), but is not subject to the disallowance or sun-setting regimes that apply to legislative instruments. MPSs can, however, have an end date if the Minister so wishes, or can be repealed if they are no longer relevant.

The making of an MPS by notifiable instrument allows the Minister to provide formalised policy guidance, without compelling ACMA by legislative instrument or Ministerial direction. The approach is less prescriptive and fits within the broader policy intent of the Bill, to empower ACMA, as the regulator, to manage the administration of the spectrum and to reduce the Minister's involvement in the day-to-day administrative processes of ACMA.

Section 17 of the Legislation Act 2003 (the Legislation Act) does not require a rule-maker to ensure any consultation has taken place before making a notifiable instrument. However, in the interests of clarity of the law and transparency, it is expected that the Government would undertake consultation that is appropriate and reasonably practicable in the circumstances, before the Minister makes any MPS.

The new subsection 28C also provides that ACMA must "have regard" to any relevant MPSs in performing or exercising its spectrum management functions and powers. This essentially means the matters outlined in MPSs must be considered by ACMA in performing its spectrum management functions and exercising its spectrum management

powers. The context will determine the weight to be given to an MPS, alongside other relevant considerations. Additionally, if MPSs are out of date, not relevant to the powers and functions ACMA is currently exercising, or in any way conflict for a particular power or function, as the decision maker ACMA will be able to take an MPS into account to the extent it is relevant to, and does not conflict with, that power or function.

While an MPS constitutes formal ministerial guidance to ACMA to which ACMA must have regard, ACMA is not required by this Part to act in accordance with a policy specified in an MPS. This distinguishes an MPS from the stronger regulatory intervention available to the Minister by way of giving a direction either under a provision of the Act or section 14 of the ACMA Act. This allows the Government of the day to provide overarching policy guidance where applicable and rely on statutory directions powers where appropriate. This approach provides a variety of options to indicate the Government's intent and allows for greater transparency in decision-making.

Subsection 28C(2) will ensure that the validity of an instrument issued by ACMA, or any other thing done by ACMA, may not be challenged on the basis that ACMA failed to have regard to a relevant MPS. This is to provide certainty to spectrum users who rely on these legislative instruments or administrative decisions made by ACMA.

ACMA will be required to provide a summary outline of how it has had regard to any relevant MPSs in its annual report (see paragraph 57(g) of the ACMA Act, as proposed to be amended by Item 3 of this Schedule).

Part 1.6—Annual Work Program—Sections 28D to 28F

Item 2 of Schedule 2 of this Bill also adds a new Part 1.6 to the Act. This Part relates to ACMA's annual work program.

Section 28D provides a simplified outline of Part 1.6 of the Bill.

Section 28E sets out the requirements for ACMA to determine an annual work program.

Subsection 28E(1) provides that ACMA must determine a work program at least once in each financial year in relation to its spectrum management functions and powers.

Subsection 28E(2) requires that program to be for a period of not less than 5 financial years. This would generally be expected to include a detailed annual work program, a forward allocation work program and a more general spectrum outlook and forward plan for the out-years.

At least one new work program must be determined each financial year. However, in accordance with subsection 28E(3), ACMA may determine a work program to replace a work program that is in place, in which case the old work program will be taken to have been revoked and ACMA will not be required to report on it insofar as it has been superseded by the new work program.

Under subsection 28E(4), ACMA must publish its annual work program on its website.

In accordance with subsection 28E(5) a work program is not a legislative instrument.

These provisions are declaratory of the law rather than substantive exceptions, as a work program (or a variation of a work program) would not be a legislative instrument in accordance with subsection 8(4) of the Legislation Act because a work program does not determine or alter the law. While a work program is an important statement of spectrum

management activities intended to be carried out by ACMA, a work program will not be binding on ACMA.

ACMA's annual work program is intended to include information about the anticipated spectrum management activities and priorities of ACMA for at least the next five financial years. It is anticipated that ACMA would also provide particular detail regarding short-term priorities and activities for the upcoming financial year. The work program may also include information relating to the previous financial year, such as how ACMA plans to have regard to or give effect to any relevant Ministerial policy statements or directions, and the details of any changes to ACMA priorities since the previous financial year's work program.

During the transition and implementation period, ACMA may provide an indication of its anticipated implementation process in the work program.

Subsection 28F(1) provides that, before determining a work program, ACMA must consult the Minister. The subsection also requires ACMA to undertake appropriate consultation prior to finalising a work program. This would be expected to generally include publishing a draft work program and inviting persons to make submissions to ACMA about the draft, which ACMA would then take into account in finalising the work program. The precise terms or forms of any consultation, however, are a matter for ACMA's discretion.

Part 2—Other amendments

Australian Communications and Media Authority Act 2005

Item 3—At the end of section 57

Item 3 amends the annual report provisions in section 57 of the ACMA Act. This will require that, in its annual report, ACMA summarise how it has had regard to any existing MPSs and report on how it has given effect to its annual work program, if one was in effect during the period covered by the annual report. This will help provide transparency into how MPSs have shaped ACMA's regulatory approach, broadly speaking, and provide accountability with regard to the annual work program.

Part 3—Application provisions

Item 4—Application—ACMA's work program

Item 4 provides for transitional arrangements following the introduction of the amendments related to the annual work program. This will give ACMA enough time to produce its first annual work program in line with the requirements set out in the new Sections 28E and 28F. While the new work program regime would not commence until the financial year after this new Part comes into effect, it is still expected that ACMA will continue to produce its five-year spectrum outlook until Section 28E applies, providing continuity for stakeholders and industry.

SCHEDULE 3—LICENCES ETC.

Schedule 3 relates to the licensing of spectrum, including allocation processes, re-allocation processes, the renewal of spectrum licences and apparatus licences, and the duration of licences.

The changes made to allocation and re-allocation processes by this Schedule of the Bill seek to give effect to recommendations in the 2015 Spectrum Review regarding the need to provide for transparent and timely spectrum allocation and re-allocation processes and methods.

In line with this, the Schedule proposes amendments to the Act that would give ACMA greater responsibility over day-to-day allocation and re-allocation processes, while retaining the Minister's power to direct ACMA when appropriate. Other key changes proposed by this Schedule to the Bill which aim to improve processes and methods include:

- the repeal of designation and conversion processes;
- a new power to directly allocate licences;
- changes to allocation limits in price-based allocation processes;
- simplifying the process for re-allocating encumbered spectrum.

Amendments to Part 3.2 of the Act propose to repeal conversion processes. This will contribute to the wider aim of adding flexibility to allocation and re-allocation processes by allowing spectrum licences and apparatus licences to be issued in the same bands, where appropriate. Conversion processes will be replaced, in part, by the introduction of direct allocation of licences.

Proposed changes to Part 3.2 will also reform the methods and procedures for allocating spectrum licences. In addition to allowing ACMA to directly allocate spectrum licences, changes will also be made to the allocation limits powers, allowing ACMA to set allocation limits (after consultation with the ACCC) without the need for a direction from the Minister. This added flexibility will help in empowering ACMA to design fit-for-purpose allocation processes, and adapting to changing spectrum use cases and market needs.

This Part will also impose restrictions on direct allocation, in order to provide protections for incumbent licensees.

In line with the changes outlined above, amendments to Part 2.2 proposed by this Schedule to the Bill will remove conversion plans and the concept of designation from the Act. Changes to this Part will also be necessary as part of introducing direct allocation and the possibility of re-allocating parts of the spectrum using a combination of spectrum licences and apparatus licences.

This Schedule of the Bill also proposes amendments to Part 3.3 of the Act, which relates to apparatus licences. These changes are in line with changes proposed for spectrum licences, including with regard to the setting of allocation limits in price-based allocations.

Part 3.6 of the Act deals with the re-allocation of encumbered spectrum. As part of granting ACMA greater independence and discretion in day-to-day administrative processes, this Schedule to the Bill proposes to make ACMA, rather than the Minister, the decision-maker for re-allocation processes. This is intended to simplify the process for

industry, licensees and ACMA, and reduce unnecessary delays. Under these amendments, ACMA would be able to make re-allocation declarations, thereby streamlining the process, without compromising the requirement for ACMA to undertake adequate consultation with industry and stakeholders.

As mentioned, the proposed amendments would also allow for re-allocation using a combination of spectrum licences and apparatus licences. It is also proposed to remove the general prohibition on issuing apparatus licences in parts of the spectrum that have been subject to a re-allocation declaration, while introducing appropriate protections and restrictions of the issue of apparatus licences. These changes will help add flexibility to re-allocation processes and prevent spectrum becoming ‘locked’ into spectrum licensing, as new spectrum use cases and licensing approaches emerge in future.

Proposed changes to Part 3.6 also relate to the timing of re-allocation processes. Reducing the minimum re-allocation period to 12 months and changing the requirements around the re-allocation deadline will give ACMA greater discretion to run re-allocation processes that balance licensees’ need for certainty with the need to avoid lengthy delays and provide for the efficient management of spectrum.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Subparagraph 4(a)(ii)—Outline of the Act

Section 4 of the Act provides an outline of the Act. Item 1 removes a reference to conversion plans under Part 2.2, as these are proposed to be repealed by Item 9 of this Schedule to the Bill.

Item 2—Section 5 (definition of *conversion plan*)

Provisions related to conversion plans are being repealed by a number of items in this Schedule to the Bill. As such, it is appropriate to repeal the definition in Section 5 of the Act.

Item 3—Section 5—Definitions

Item 3 of this Schedule to the Bill adds a number of new definitions to the Act, relevant to new powers (such as direct allocation) or changes in licence processes (such as renewal statement).

Item 3A—Subsection 27(2A)

Item 3A adds that a determination made under subsection (2) may confer a power to make a decision of an administrative character on a person or ACMA. This is similar to the powers of determinations made under subsection 302(2). The ability to make administrative decisions in relation to exemptions under section 27 could allow ACMA to be more flexible and responsive to the needs of exemption holders, while also providing for a measure of transparency in the form of the registration of notifiable instruments. This Bill includes a number of provisions that enable ACMA to empower itself and others to make administrative decisions. These additional express powers are not intended to impact the powers that ACMA previously had to confer such powers, with this provision avoiding doubt about whether such a power exists after the amendments made by this Bill.

Item 4—Paragraph 29(3)(a)—Outline of Chapter 2

Item 4 repeals a paragraph that refers to conversion plans under Part 2.2. As the power to make conversion plans is proposed to be repealed by Item 9 of this Schedule to the Bill, it is appropriate to repeal the paragraph.

Item 4A—Subsection 30(2A)

Item 4A clarifies that a spectrum plan may confer a power to make a decision of an administrative character on ACMA. The ability to make administrative decisions in relation to spectrum plans currently allows ACMA to confer a power on itself to authorise the use of a frequency band for unspecified services. This Bill includes a number of provisions that enable ACMA to empower itself and others to make administrative decisions. These additional express powers are not intended to impact the powers that ACMA previously had to confer such powers, with this provision avoiding doubt about whether such a power exists after the amendments made by this Bill.

Item 5—Part 2.2 (heading)

Part 2.2 of the Act relates to conversion plans and marketing plans. As part of simplifying processes and adding flexibility to re-allocations, these amendments propose to remove conversion processes from the Act. As such, it is appropriate to amend the heading.

Item 5A—Subsection 32(5A)

Item 5A clarifies that a frequency band plan may confer a power to make a decision of an administrative character on ACMA. This Bill includes a number of provisions that enable ACMA to empower itself and others to make administrative decisions. These additional express powers are not intended to impact the powers that ACMA previously had to confer such powers, with this provision avoiding doubt about whether such a power exists after the amendments made by this Bill.

Items 6 and 9—Sections 36 and 38 (Repeal)

Items 6 and 9 of this Schedule to the Bill propose to repeal Section 36 and Section 38 of the Act, respectively, which deal with designation and conversion. These amendments are designed to simplify the process of allocating spectrum, by removing unnecessary prescription from the Act and giving ACMA greater leeway to adapt allocation processes to the needs of industry and spectrum users.

The repeal of Section 36 will remove the designation process and the concept of designation notices. This is also in line with the wider aim of these reforms with regards to reducing the Minister's involvement in administrative decisions. Along with the changes to Section 39 (described below), the repeal of Section 36 means that ACMA will be able to prepare a marketing plan, by legislative instrument and following appropriate consultation, for any unencumbered spectrum.

Removing the designation process also removes the need for the conversion process. As such, it is proposed to repeal Section 38 of the Act. The conversion process will instead be partially replaced by the proposed new power to directly allocate licences and the added flexibility of being able to allocate spectrum by a combination of spectrum and apparatus licences.

Items 10, 11 and 12—Section 39—Unencumbered spectrum

Section 39 of the Act relates to marketing plans for issuing spectrum licences. Items 10 and 11 of this Schedule to the Bill propose amendments to Section 39 that reflect the proposed repeal of designation notices, factor in the proposed new power to directly allocate licences and make it explicitly clear that ACMA is able to prepare a marketing plan for issuing licences using a combination of procedures.

Item 10 also inserts a new Subsection 39(2) which makes clear that a marketing plan under this section can only be made in relation to the issue of spectrum licences for spectrum that is not currently encumbered by apparatus licences, except where ACMA intends to issue a spectrum licence to replace the apparatus licence, using the direct allocation provisions in section 60B, which may have previously been undertaken using the conversion processes that are repealed by this Bill. Otherwise, a marketing plan could be issued under Section 39A in these circumstances, pursuant to a spectrum re-allocation declaration.

Item 12 of this Schedule to the Bill adds a new Subsection 39(7) which maintains certain protections that are currently expressed in Subsection 36(5) of the Act, which is to be repealed by Item 6 of this Schedule.

Items 13 and 14—Section 39A—Marketing plans—Re-allocation of spectrum

Section 39A of the Act relates to marketing plans for re-allocation of spectrum. In line with the changes to Section 39, Item 14 makes changes relevant to the introduction of direct allocation and makes it explicitly clear that ACMA is able to prepare a marketing plan for issuing licences using a combination of allocation procedures. Item 13 would give ACMA the power to create marketing plans for re-allocating spectrum using a combination of spectrum licences and apparatus licences. This is intended to help prevent bands from becoming ‘locked’ into spectrum licensing and allow ACMA greater discretion to make appropriate licensing decisions as circumstances and spectrum needs change.

Items 7, 8, 15, 16, 17, 18, 19 and 20

These items of this Schedule to the Bill make relevant consequential changes and remove references that are no longer relevant, for example references to conversion plans or to sections repealed by other items.

Item 20A – After subsection 44A(4)

This item inserts subsection 44A(4A) which allows for a digital radio channel plan to confer a power to make a decision of an administrative character on the ACMA.

Item 20B – Subsections 48(1) and (2)

Section 48 of the Act contains presumptions that apply under section 47 of the Act, so that a person who has a radiocommunications device in their possession is deemed to have it for the purposes of operation, unless they have it to supply the device to another person. This applies whether the device is capable of being operated after taking one or more steps.

This item updates references in subsection 48(1) and 48(2) so that they no longer describe steps that can be taken by reference to analogue equipment, and maintain the ability of a defendant to adduce evidence to rebut the presumption.

Items 21 and 22—Paragraph 51(2)(a) and subsection 51(5)—Outline of Part 3.2

Section 51 of the Act provides an outline of Part 3.2 of the Act. Items 21 and 22 remove or add references, as appropriate, to reflect amendments proposed by other items in this Schedule to the Bill.

Item 23—Subdivision A of Division 1 of Part 3.2

Subdivision A of Division 1 of Part 3.2 of the Act sets out the process for converting apparatus licences into spectrum licences. As this process is being removed from the Act, in line with other amendments being made to re-allocation processes, Item 23 of this Schedule repeals that Subdivision.

Item 24—Subsection 60(1)—Procedures for allocating spectrum licences

Subsection 60(1) provides that ACMA must determine the procedures that will be applied in allocating spectrum licences by auction, tender or for a pre-determined or a negotiated price. This item adds new paragraphs to Subsection 60(1) that require ACMA to have procedures to allocate spectrum licences by direct allocation or by a combination of methods.

Direct allocation will serve to partially replace the current conversion process (as outlined above) and will also provide a more straightforward process for situations where it is preferable to allocate a spectrum licence to a particular person, for example, as it relates to defence, public safety and community purposes, or to facilitate the defragmentation of a band. It is not intended that the general rules on assignment of spectrum licences be different for directly allocated licences, noting ACMA has the power to make rules concerning assignments under section 88 of the Act where this is appropriate.

Additionally, licensees with a directly allocated licence will need to pay a spectrum access charge, which is published by ACMA in the form of a determination. This, along with any marketing plan prepared by ACMA as part of the allocation, will provide additional transparency to direct allocation processes.

Requiring procedures for the allocation of spectrum through a combination of methods is designed to ensure ACMA has the flexibility to allocate spectrum in the manner that best ensures the object of the Act is achieved.

Item 25—Subsections 60(2)—Procedures for allocating spectrum licences

Subsection 60(2) provides examples of the matters that procedures for allocation by auction may deal with. This item amends Subsection 60(2) to reflect that such procedures may deal with allocation by auction in part, with other parts of the procedures dealing with allocation by other means.

Item 26—Paragraphs 60(2)(ca) and (cb)—Procedures for allocating spectrum licences

Subsection 60(2) provides examples of the matters that procedures for allocation by auction may deal with. This item makes it clear that the procedures may set eligibility criteria that a person must meet in order to be able to participate in an auction and for ACMA to provide credits (if any) for prospective bidders. This will enable ACMA to determine that certain bidders or classes of bidders will have their bid deemed to be increased by a specified amount, where providing such a bidder an advantage in an auction process is consistent with the object of the Act. As procedures under Section 60 are determined in writing, prospective bidders would continue to have transparency in terms of the operation of the auction process, including any credits that other bidders may have been afforded.

Item 27—Subsection 60(3)—Procedures for allocating spectrum licences

Subsection 60(3) provides examples of the matters that procedures for allocation by tender may deal with. This item amends Subsection 60(3) to reflect that such procedures may deal with allocation by tender in part, with other parts of the procedures dealing with allocation by other means.

Item 28—Paragraphs 60(3)(ca) and (cb)—Procedures for allocating spectrum licences

Subsection 60(3) provides examples of the matters that procedures for allocation by tender may deal with. This item provides that the procedures for allocation by tender can set eligibility criteria that a person must meet in order to be able to participate in a tender process. The procedures allow ACMA to provide credits (if any) for prospective tenderers. This will enable ACMA to determine that certain tenderers or classes of tenderer will have their tender deemed to be increased by a specified amount, where providing such a participant an advantage in a tender process is consistent with the object of the Act. As procedures under Section 60 are determined in writing, prospective tenderers would continue to have transparency in terms of the operation of the tender process, including any credits that other participants may have been afforded.

Item 29—Subsection 60(4)—Procedures for allocating spectrum licences

Subsection 60(4) provides examples of the matters that procedures for allocation for a pre-determined or negotiated price may deal with. This item amends Subsection 60(4) to reflect that such procedures may deal with allocation for a pre-determined or negotiated price in part, with other parts of the procedures dealing with allocation by other means.

Item 30—Paragraphs 60(4)(ba) and (bb)—Procedures for allocating spectrum licences

Subsection 60(4) provides examples of the matters that procedures for allocation for a pre-determined or negotiated price may deal with. This item includes further examples into this subsection, to make clear that the procedures can set eligibility criteria that a person must meet in order to participate. They will also enable ACMA to provide credits for any prospective licensee. This will enable ACMA to determine that certain prospective licensees or classes of them will have the pre-determined or negotiated price deemed to be reduced by a specified amount, where providing such a participant an advantage in the process is consistent with the object of the Act. As procedures under Section 60 are determined in writing, prospective licensees would continue to have transparency on the operation of the allocation process, including any credits that other participants may have been afforded.

Item 31—Paragraphs 60(5)(a) and (b)—Allocation limits

Paragraphs 60(5)(a) and (b) of the Act enable ACMA to include allocation limits in the procedures for the allocation of spectrum licences. These limits specify a maximum amount of the parts of the spectrum that may be used (i.e. under a licence or an authorisation) by a person or group of persons. Allocation limits are an important tool to help promote competition and allocative efficiency in markets that rely on spectrum, which in turn can help promote the long-term public interest derived from the use of the spectrum. They can be imposed to limit the amount of spectrum any one licensee can acquire through an allocation process (thereby preventing monopolisation of the spectrum), or may be used to establish conditions that encourage the participation of new entrants in the market. In developing allocation limits, ACMA would be expected to take into account matters such as relevant market conditions and the technical properties of the frequency bands under consideration.

This item repeals and substitutes these provisions so that they clearly permit ACMA to apply these limits across the total spectrum holdings of a participant in an allocation process, including those under existing apparatus and spectrum licences and licences to be allocated under the allocation process. With the increase in duration of apparatus licences, there are likely to be more instances in which an apparatus licence is a closer substitute for a spectrum licence, meaning allocation limits may need to address both types of licence in more instances.

Item 32—Subsection 60(7A)—Frequency assignment certificates

Currently, as part of the administrative issuance of apparatus licences under Section 100 of the Act, ACMA can consider a frequency assignment certificate issued by an accredited person to ensure that the spectrum is efficiently allocated and interference is effectively managed. With the introduction of direct allocation of spectrum licences, this item amends Section 60 so that ACMA may consider such a certificate in the direct allocation of a spectrum licence.

Item 33—Subsection 60(8)—Procedures for issuing spectrum licences

Subsection 60(8) provides that various subsections of Section 60 do not limit the broad discretion of ACMA to make procedures for the allocation of spectrum licences. This item amends Subsection 60(8) so that it will refer to the new Subsection (7A) introduced by this Schedule.

Items 34 and 35—Subsections 60(9) and 60(13)

Item 34 and Item 35 of this Schedule deal further with allocation limits. As part of granting ACMA greater independence and discretion in administrative processes, it is proposed that ACMA will no longer require a direction from the Minister in order to be able to impose allocation limits when allocating spectrum licences under Section 60 of the Act. Item 35, however, would impose an additional requirement that ACMA must consult with the ACCC regarding limits in any particular allocation process.

Item 36—Subsection 60(14A)—Procedures may confer administrative decision making power

This item inserts a new subsection into Section 60, so that in determining the procedures to apply to an allocation process, the procedures can confer a decision making power on a person or ACMA. This is intended to enable ACMA to determine criteria and rules in the procedures, consistent with current practice, but to clarify that it is at the discretion of ACMA how these criteria will apply in particular circumstances.

Item 37—Subsection 60(16)

Item 37 clarifies that a determination under Subsection 60(1) is a legislative instrument. This provision is purely declaratory of the law, as determinations under Subsection 60(1) are already considered legislative instruments and registered by ACMA. The inclusion of this new subsection is intended to remove ambiguity.

Item 38—Sections 60A and 60B—Direct allocation of spectrum licences and restriction on allocation of spectrum licences

Item 38 of this Schedule to the Bill proposes to insert a new Section 60A and Section 60B into the Act. The proposed Section 60A would define and outline the new direct allocation method, while Section 60B would impose restrictions on the allocation of spectrum licences, so that ACMA is not able to issue a spectrum licence where the relevant part of the spectrum is licensed under another spectrum licence. This restriction is designed to provide certainty and protection to incumbent spectrum licensees.

Item 40—Section 65A—Renewal statements etc.

Item 40 inserts a new Section 65A in the Act. This section provides that a “renewal statement” must be included in a spectrum licence if the licence is issued after the commencement of this section.

For the purposes of this Act, a renewal statement refers to a statement that is issued with a spectrum licence that details whether the licence is able to be renewed. If a licence is able to be renewed, the renewal statement may include conditions that must be met in order for renewal to be considered. In all instances where renewal is available, renewal is at the discretion of ACMA.

The use of renewal statements is intended to clarify and simplify the arrangements for renewal of spectrum licences, providing predictability surrounding renewal processes which will provide greater certainty for licensees. This may include the timing of renewal applications and rules regarding the content of renewed licences. Depending on the content of the renewal statement, the expiry of licences can also provide a significant review point for ACMA to consider whether the existing allocation of the spectrum remains the most efficient.

A renewal statement indicating that the spectrum licence may be renewed at ACMA's discretion would be similar to the current approach to apparatus licensing. This gives the regulator, at the end of the term of the licence, the ability to assess the best way to promote the long-term public interest derived from the use of the spectrum, and renew the licence, return the part of the spectrum authorised by the licence to market (if appropriate) or reserve the part of the spectrum (e.g. for future use, or for interference management purposes). For all legislative instrument powers outlined in 65A, Section 33(3) of the Acts Interpretation Act 1901 also applies, wherein ACMA retains the power to vary or revoke an instrument.

Under Paragraph 65A(1)(c), a renewal statement may provide that the licence may be renewed in specified circumstances. The renewal statement will specify what these circumstances are in each case, so licensees have clarity on what is required for their licence to be eligible for renewal. Subsection 65A(3) provides that "specified circumstances" may include an act or omission performed by ACMA. This promotes clarity for licensees about the process and timing to be followed at end of term of a licence. If the conditions are not met, then the licence is not eligible for renewal. In the instance that all specified circumstances have been met, licence renewal remains at the discretion of the ACMA, considering the factors set out in section 77C.

Under Subsection 65A(5), ACMA has the power to issue a renewal statement by legislative instrument to apply to all spectrum licences included within a specified class of spectrum licences. Such a legislative instrument does not apply to licences issued prior to the commencement of these amendments, and cannot override a renewal statement made under Subsection 65A(1), as clarified by Subsection 65A(9).

Subsection 65A(10) provides that a licence must also set out a renewal application period if the licence includes a statement that the licence may be renewed at ACMA's discretion or at ACMA's discretion so long as "specified circumstances" exist. The renewal application period must begin at a time when the licence is in force, and end before the licence is due to expire. A renewal application period may be specified in a legislative instrument to apply to a specified class of spectrum licences, but such an instrument cannot override a renewal application period statement included in a licence under Subsection 65A(10), as clarified by Subsection 65A(14). Subsections 65A(15) and (16) provide that a spectrum licence may include a statement to the effect that a specified period is the "renewal decision-making period" for the licence. This provides further clarity for licensees about timing at the end of a licence term.

Subsection 65A(17) stipulates that ACMA may include a statement in a spectrum licence that it will not be renewed by ACMA unless ACMA is satisfied that it is in the public interest to do so. This is to be known as the “public interest statement”. The definition of public interest is up to the discretion of ACMA, and is consistent with considerations that ACMA currently applies to its spectrum licencing and management decisions. It is a tool for ACMA to analyse the potential benefits that renewal of a spectrum licence may offer to the long-term public interest, consistent with the object of the Act. As such, some of the matters that ACMA may consider in making a decision regarding the public interest of renewing a spectrum licence include: if the licence is used to supply essential public services and there is the potential that a change in licensees may put at risk delivery of services to a significant number of people, whether the incumbent can demonstrate substantial investment and past long-term use of the licensed spectrum, and considerations of the highest value use of the spectrum.

This power extends to including a public interest statement in a specified class of spectrum licences by legislative instrument, similar to the renewal statement.

Subsection 65A(21) provides that, if a marketing plan is already in force before the commencement of this section or the licence is to be issued as a result of the repealed section 56 (under the conversion process), then there is no power for a renewal statement to be issued under subsection (1) or for a determination to apply a renewal statement to the licence under subsection (5) or a determination to apply a public interest statement to the licence under subsection (19). This exception has been designed to provide certainty for processes currently underway at the commencement of these amendments, due to the considerable investment and planning that are implemented based on the marketing plan and conversion plan. Similarly, Subsection 65A(22) provides that subsections (5) and (19) do not apply to licences that have been issued under the re-issuance provisions that are repealed by this Bill.

Item 40A – Paragraph 68A(2)(b)

Section 68A of the Act states that an authorisation to use spectrum under a spectrum licence is taken to be an acquisition for the purposes of section 50 of the *Competition and Consumer Act 2010*. This item amends paragraph 68A(2)(b) to make clear that the full suite of remedies available under that Act are available should an authorisation contravene section 50 of the *Competition and Consumer Act 2010*.

Item 40B – Paragraph 71A(2)(b)

Section 71A of the Act states that the issue of a spectrum licence is taken to be an acquisition for the purposes of section 50 of the *Competition and Consumer Act 2010*. This item amends paragraph 71A(2)(b) to make clear that the full suite of remedies available under that Act are available should an issuance contravene section 50 of the *Competition and Consumer Act 2010*.

Item 41—Subsection 71A(3)—Issue of spectrum licence taken to be an acquisition of an asset and conduct

The amendment to Subsection 71A(3) provides that the issue of a spectrum licence is taken to be an acquisition of an asset and conduct engaged in by the person, for the purposes of the *Competition and Consumer Act 2010*, with the re-issue of a licence being

one of the exceptions. This item updates the numbering and language of this section in line with the revised issue and renewal processes for spectrum licences.

Item 42—Section 72—Variation with agreement

Section 72 (as amended) provides that ACMA may, with the written agreement of the licensee of a spectrum licence, vary a licence by:

- varying the renewal statement included in the licence; or
- omitting the original renewal statement and substituting with another renewal statement; or
- varying the renewal application period statement included in the licence; or
- omitting the public interest statement included in the licence; or
- omitting the renewal decision-making period statement included in the licence; or
- varying the renewal decision-making period statement included in the licence.

If the renewal statement is varied or substituted, the revised statement must comply with the requirements set out in Section 65A. If the renewal application period statement is varied, the revised statement must comply with the requirements of Section 65A. In the instance where multiple revisions are made to a statement or multiple statements are issued relating to a licence (i.e. through a legislative instrument and by a renewal statement), the most recently issued statement is the one that is deemed most relevant to the licence.

Item 43—Section 73—Variation without agreement

This item provides that if a spectrum licence includes a renewal statement to the effect that the licence may be renewed at the discretion of ACMA so long as specified circumstances exist, ACMA may, by written notice given to the licensee of a spectrum licence, vary the licence by:

- varying the circumstances specified in the renewal statement included in the licence; or
- omitting the original renewal statement and substituting with another renewal statement to the effect that the licence may be renewed so long as specified circumstances exist;

If ACMA changes a statement through the above methods, the revised statement is still required to comply with the requirements set out in Section 65A. ACMA must not vary the licence unless it is satisfied that exceptional circumstances exist that warrant the variation of the renewal statement. Varying a renewal statement without the agreement of the licensee is a reviewable decision under Part 5.6 of the Act. In the instance where multiple revisions are made to a statement or multiple statements are issued relating to a licence (i.e. through a legislative instrument and by a renewal statement), the most recently issued statement is the one that is deemed most relevant to the licence.

Item 44—Division 3A—Renewal of spectrum licences

This item sets out the revised renewal process for spectrum licences in the new Sections 77A, 77AA, 77B, 77C and 77D, which outline the application process, conditions on the applicant required for the issuing of a spectrum licence, ACMA's power to refuse the

renewal of a spectrum licence, and the applicant's right to request further information in the instance of a refusal.

Section 77A—Applications for renewal of spectrum licences

Subsections 77A(1)-(3) provide for the holder of a spectrum licence to apply for a renewal of the licence within the renewal application period if there is a period specified in the licence or, where there is no renewal application period specified in the licence, then within 2 years of the day that the licence is due to expire.

Subsection 77A(4) requires a licensee to apply in a manner and form approved by ACMA, and provide certain information and documentation with the application. Section 304 allows ACMA to require an application to be made in an electronic form.

Subsection 77A(5) provides that ACMA may approve different forms for different applications. This includes applications in electronic form, as per section 304. This provision allows ACMA to maintain flexibility in the content of application forms in order to ensure that the information required is appropriate to the licence being sought.

Subsection 77A(6) provides that ACMA may, through legislative instrument, specify the information required for the purposes of subsection 77A(4).

Subsection 77A(7) provides that ACMA may, through legislative instrument, specify the documents required for the purposes of subsection 77A(4).

Subsection 77A(8) provides that an instrument made by ACMA under paragraph 77A(4)(a) is a notifiable instrument. Under subsection 77A(9) an approved form of application may provide for verification through statutory declarations of statements made in the application.

Subsection 77A(10) allows for the renewal of a spectrum licence to be made through a deemed application. Under the subsection, ACMA may give a person that holds one or more spectrum licences a licence renewal notice including an amount payable which, if paid by the due date, is deemed to be an application or separate applications (depending on whether the notice mentions one or more licences) and that Subsection 77A(4) does not apply to the application or applications. A deemed application is considered to be an application for spectrum licence for the purposes of this Act and also applies beyond this Act.

Section 77B—Further information

This Section provides that if an application is made for the renewal of a spectrum licence, then ACMA may request further information in connection to the application. ACMA must notify the licensee in writing of the request. If information is requested by ACMA, the licensee must present this within the period specified by ACMA. Should the licensee fail to present the requested information to ACMA by the specified date, then ACMA may present them with a written notice outlining ACMA's refusal to further consider or action the renewal application.

Section 77C—Renewal of spectrum licences

This Section outlines the process by which a spectrum licence may be renewed by ACMA. If an application is made for renewal of a spectrum licence then ACMA need not follow procedures determined under section 60, and may instead apply the process in this section. For clarity, subsection (2) provides that a licence must not be renewed under this process

until the spectrum access charge has been paid or a payment method and timing be agreed upon.

In deciding whether to renew a spectrum licence, ACMA must have regard to the matters it considers relevant to the renewal, and the effect that the renewal will have on radiocommunications. Subsection 77C(8) outlines in further detail what ACMA may have regard to, including any outstanding liability to pay an apparatus licence tax, spectrum licence charge, spectrum access charge or interim tax, compliance with conditions of the licence, and previous licence history for both the applicant and any third-party users. However, these serve only as an example, with ACMA also having the discretion to consider matters such as the potential impact on competition and downstream markets, whether renewal of the licence would be in the long-term public interest, the planned future use of the spectrum, or any additional matters it considers relevant.

A spectrum licence is able to be renewed for a period of up to 20 years. If ACMA decides to renew a licence for a period of 10 years or longer, it must be satisfied that it is in the public interest. The concept of “public interest” is expanded upon in Section 65A.

The renewal of a spectrum licence can be conditional on the fulfilment of the terms outlined within the renewal statement. For example, if the renewal statement of a spectrum licence includes stipulations on specified circumstances that must be met, then renewal of the licence cannot be considered unless ACMA is satisfied that the licensee has met those specified circumstances.

Similarly, if the renewal statement of a licence includes the condition that the licence could not be renewed, then that licence is ineligible for renewal based upon the renewal statement.

To promote efficient spectrum management and allow spectrum to move where its highest value use changes over time, the section clarifies that ACMA is not to presume that a further licence will be issued. The renewal statement is to be used as a tool to provide certainty to licensees on the conditions that must be met in order for renewal to occur. If the licensee acts in accordance with these conditions, then they have greater certainty on how a decision on renewal will be made.

If renewal of a licence is agreed to by ACMA, then that new licence comes into force immediately after the expiration of the licence that it replaces. The conditions, including the core conditions, of the new licence do not need to be the same as the initial licence.

Section 77D—Notice of refusal to renew spectrum licence etc.

This Section stipulates that if ACMA refuses to renew a spectrum licence, or renews a spectrum licence with varied conditions to the original licence, then it must give the licensee a written notice stating that fact. This written notice must state that the licensee may request a statement of reasons for the decision, and that this request must be made within 28 days of receipt of the notice. If ACMA receives a request for a statement of reasons, it must provide the statement within 28 days of receiving the request. Refusal to renew a licence and changes to licence conditions are reviewable decisions under Part 5.6 of this Act.

Section 77E—Application of other provisions

This Section provides that Subdivisions C and D of Division 1 apply to a spectrum licence issued under this Division in the same way that those subdivisions apply to spectrum licences issued under Division 1.

Item 45—Division 4 of 3.2 (heading)

This item amends the heading to Division 4 of Part 3.2, so that it reflects that this Division applies to the issuance of further spectrum licences, other than through renewal of licences. As a result of the amendments made by Item 44 to insert Division 3A into Part 3.2, this Division no longer deals with the re-issue of a spectrum licence.

Items 46, 47 and 50—Sections 78, 79 and 81—Headings

Items 46, 47 and 50 change the headings of Sections 78, 79 and 81 to reflect the change in the purpose of the Division, namely, that the issuance of further licences outside of an allocation process under section 60 is at the discretion of ACMA.

Items 48 and 49—Section 80—Procedures for re-allocating spectrum licences

Section 80 of the Act provides that the procedures used to consider applications for a spectrum licence under Section 60 apply to the re-allocation of spectrum licences under this section to the extent that the procedures are capable of applying. Item 49 inserts a new subsection to clarify that the procedures issued under section 60 are able to be amended, so that they are able to function as procedures for the re-allocation of the licences.

Item 51—Section 82—Re-issue of spectrum licences to the same licensees in the public interest

Section 82 of the Act provides the circumstances in which a spectrum licence may be re-issued without following the procedures determined under Section 60, where this is in the public interest. This section is to be repealed due to the addition of renewal processes in Division 3A of Part 3.2.

Item 51A—At the end of section 88—Rules about assignments

Section 88 of the Act provides the rules about assignments for spectrum licences, and sets out the circumstances in which licences are to be varied, issued or cancelled under section 87. This item allows for the making of rules that confer a power to make a decision on an administrative character on ACMA.

Item 52—Subsection 96(2)—Outline of Part 3.3

Part 3.3 deals with apparatus licences. This item amends the outline of Part 3.3, so that the language is in line with the reforms in other items. This item omits references of ‘types’ of licences and substitutes it with ‘kinds’ of licences, in line with the amendments to definitions related to apparatus licences.

Item 53—Division 1 of Part 3.3 (heading)

This item amends the heading of Division 1 of Part 3.3, so that the language is in line with the purpose of the reforms. The item omits references of ‘types’ of licences and substitutes it with ‘kinds’ of apparatus licences, in line with the amendments to definitions related to apparatus licences.

Item 54—Subsections 97(2) and (3)—Transmitter licences and receiver licences

The amendment to Subsection 97(2) clarifies that a transmitter licence applies to the operation of any kind of radiocommunications transmitter that is not already covered as a specified radiocommunications transmitter or a specific kind of radiocommunications transmitter. Subsection 97(3), which applies to receiver licences, is amended in the same terms.

Item 55—Subsection 98(2)—Types of transmitter licences and receiver licences

This amendment clarifies that ACMA can issue an apparatus licence that is not a transmitter licence or a receiver licence. This enables ACMA to issue apparatus licences that are of a specific type, specific types, or of no specific type; with a different range of radiocommunications devices authorised to be operated by the licence holder depending upon the type of licence.

Items 56—62—Sections 99 and 100—Applications for apparatus licences and Issuing apparatus licences

These items modify the language in the sections to make it consistent with the proposed reforms to spectrum licences. This includes the term “in writing” to ensure that this phrase is flexible in its application and can be applied to any automated and computerised process approved by ACMA that is used to assess licence applications and, or, issue licences.

Item 63—Before subsection 100(5)

This item provides that in deciding whether to issue an apparatus licence, ACMA may have regard to the aggregate of the parts of the spectrum that an applicant is authorised to use under transmitter licences or spectrum licences. This makes it clear for the avoidance of doubt that, as part of the administrative allocation of apparatus licences, ACMA may consider matters such as the impact on competition, in deciding whether to issue the apparatus licence.

Item 64—Section 102G—Limits on use of the spectrum

This item adds a new Section 102G, which grants ACMA the power to impose limits, by legislative instrument, on the amount of spectrum any one person, a specified person or members of a specified group of persons can be licensed to use. This can be defined in terms of a part of the spectrum (that is, how much spectrum within a particular band), a specified area, or a specified population reach, and can include spectrum licensed under spectrum licences, existing transmitter licences, or as the result of the allocation or issue of transmitter licences under Section 100.

This means that a person covered by such a limit could not be issued any further transmitter licences under Section 100 once they reached the relevant limit. In this

situation, ACMA would have no discretion to issue or allocate them any further transmitter licences. However, Subsection 102G(7) clarifies that this section does not apply to apparatus licences issued under section 101A or 102, or digital radio multiplex transmitter licences.

Under Subsection 102G(5), ACMA must comply with any directions from the Minister issued under the specific direction power conferred by Subsection 102G(4).

Under Subsection 102G(6), ACMA must consult the ACCC before making an instrument under Subsection 102G(1).

Item 65—Section 103A—Renewal process for apparatus licences

This item outlines the revised renewal process for apparatus licences by inserting Section 103A to Section 103C, which are focussed on renewal statements and their application to apparatus licences.

Section 103A—Renewal statements etc.

This new section provides that a renewal statement may be applied to an apparatus licence, so long as that licence has been issued after the commencement of the section. Where an apparatus licence does not include a renewal statement, renewal will be at the discretion of ACMA under subsection 130(1).

For the purposes of this section, a renewal statement refers to a statement that is issued with an apparatus licence that details whether the licence is able to be renewed. If a licence is able to be renewed, a renewal statement may be included to provide conditions that must be met in order for renewal to be considered. For all these legislative instrument powers, is it intended that 33(3) of the Acts Interpretation Act 1901 applies.

The use of renewal statements is intended to clarify and simplify the arrangements for renewing licences in order to provide greater predictability for licensees seeking improved investment certainty. A renewal statement may address matters including the timing of renewal applications and requirements about the content of renewed licences.

Under subsection 103A(1)(b), a renewal statement may provide that the licence may be renewed in specified circumstances. Subsection 103A(3) specifies that “specified circumstances” may include an act or omission by ACMA.

Under subsection 103A(5), ACMA has the power to issue a renewal statement, that is a legislative instrument, which is taken to apply to a specified class of apparatus licences. This ensures that a renewal statement can be applied to apparatus licences without imposing significant administrative burden on ACMA. A determination cannot apply a renewal statement to licences issued prior to the commencement of the amendments, and cannot override a statement included under subsection 103A(1), as clarified by subsection 103A(9).

Subsection 103A(10) provides that the licence must also set out the renewal application period if the licence includes ‘specified circumstances’ that must be met in order for renewal to be considered by ACMA. It is a requirement for the renewal application period for an apparatus licence to begin at a time when the licence is in force, and end not later than 60 days after the licence is due to expire. A renewal application period statement, made by legislative instrument, may be included in licences in a similar manner as applied to renewal statements.

Subsection 103A(15) stipulates that ACMA may include a statement in an apparatus licence that it will not be renewed by ACMA unless ACMA is satisfied it to be in the public interest to do so. This is to be known as the “public interest statement”. The meaning of public interest is to be determined by ACMA, and is intended to be a tool for ACMA to analyse the potential benefits that renewal of an apparatus licence may offer to the long-term public interest, consistent with the object of the Act. The term has been designed to give ACMA flexibility in management of spectrum bands and planning for the future use of the spectrum.

Subsection 103A(19) sets out that this section does not apply to a transmitter licence issued under section 101A or 102, or a digital radio multiplex transmitter licence. Subsection 103A(20) provides that determinations specifying a renewal statement or a public interest statement do not apply to licences issued before the commencement of this section.

Section 103B—Variation of renewal statements etc. with agreement

Section 103B provides that ACMA may vary the licence through:

- varying the renewal statement included in the licence; or
- omitting the original renewal statement and substituting with a new renewal statement; or
- omitting the renewal statement included in the licence; or
- including a renewal statement in the licence; or
- varying the renewal application period statement included in the licence; or
- including a renewal application period statement in the licence; or
- omitting the public interest statement included in the licence

ACMA may only apply section 103B with the written agreement of the licensee. A statement varied or included using this section is still required to comply with the requirements set out in section 103A.

Section 103C—Variation of renewal statements etc. without agreement

Section 103C provides that ACMA may vary the licence through:

- varying the renewal statement included in the licence; or
- omitting the original renewal statement and substituting with a new renewal statement; or
- omitting the renewal statement included in the licence; or
- including a renewal statement in the licence; or
- varying the renewal application period statement included in the licence; or
- including a renewal application period statement in the licence; or
- omitting the public interest statement included in the licence

ACMA is to give notice of this variation to the licensee. Under this section there is no requirement for ACMA to seek written agreement of the licensee prior to variation. If ACMA varies or includes a statement using this section, the revised or included statement is still required to comply with the requirements set out in section 103A. A decision under this section is subject to review under Part 5.6 of the Act.

Item 66—Section 105—Restrictions on issuing apparatus licence

This item repeals section 105, and substitutes it with a new section. Section 105 prevents ACMA from issuing apparatus licences that authorise the operation of radiocommunications devices at the same frequencies and areas where a spectrum licence operates or where a marketing plan is in force in relation to the issue of spectrum licences at those frequencies or within those areas.

Section 105 stipulates, as an exception, that ACMA may issue an apparatus licence to either a body or a person for the purpose of investigations or operations, or if it is satisfied that the special circumstances of the particular case justify the issuing of a licence.

Section 105A—Notice of apparatus licences that are about to expire

Section 105A allows for (but does not obligate) ACMA to publish on its website a notice that states where information may be obtained about the apparatus licences that are included in a specified class and will expire in a specified period. ACMA may also publish the parts of the spectrum to which these licences relate. In this notice, ACMA may invite applications from persons who wish to have apparatus licences issued for the parts of spectrum identified in the notice.

Item 67—After paragraph 106(2)(b)

Section 106 of the Act deals with price-based allocations for certain transmitter licences. Subsection 106(2) designates how ACMA can design such a system. Item 67 adds further examples into this subsection, to make clear that the procedures can (but are not obligated to) set eligibility criteria that a prospective licensee must meet in order to participate. They will also enable ACMA to provide credits for any prospective licensee. This will permit ACMA to determine that certain prospective licensees or classes of them will have pre-determined or negotiated price deemed to be reduced by a specified amount, where providing such a participant an advantage in the process is consistent with the Object of the Act.

Item 68—Subsections 106(3) and (4)—Allocation limits for price-based allocation of transmitter licences

This item provides greater clarity and flexibility in terms of how ACMA can impose allocation limits in these price-based allocations. It also proposes to allow limits to be imposed on the aggregate of the parts of the spectrum that may be used (i.e. under a licence or an authorisation) by any person or groups of persons, under transmitter licences, spectrum licences or licences that may be allocated as a result of processes run under this section. In making decisions about allocation limits, ACMA may take into account the same matters as for setting allocation limits as part of determining the procedures for the allocation of spectrum licences.

Item 69—Subsection 106(8)—Price-based allocation system for certain transmitter licences

Item 69 of this Schedule to the Bill proposes to repeal Subsection 106(8) of the Act. This is consistent with the broader aims of these amendments, in giving ACMA the independence and discretion to impose allocation limits without a specific Ministerial direction, while not removing the Minister's power under Subsection 106(9) to give ACMA a direction on allocation limits if needed.

Item 70—Subsection 106(11)—Price-based allocation system for certain transmitter licences

This subsection requires ACMA to comply with any directions made by the Minister in relation to allocation limits. This item updates the language to include the term ‘any’ after the term ‘with’ to clarify that ACMA can set allocation limits without a direction from the Minister under the amendments made by this Schedule.

Item 71—Subsection 106(11A)—Price-based allocation system for certain transmitter licences

Similarly to Item 35 of this Schedule, Item 71 would impose an additional requirement that ACMA must consult with the ACCC regarding limits in any particular allocation process run under Section 106.

Item 72—Subsection 106(12)—Price-based allocation system for certain transmitter licences

This item inserts a new subsection into section 106, so that in determining a price-based allocation system, the procedures can confer a decision making power on a person or ACMA. This is intended to enable (but not obligate) ACMA to determine criteria and rules in the system, but to clarify that it is at the discretion of ACMA how these criteria will apply in particular circumstances.

Item 73—Subsection 106(18)

Item 73 clarifies that a determination under Subsection 106(1) is a legislative instrument. This provision is purely declaratory of the law, as determinations under Subsection 106(1) are already considered legislative instruments and registered by ACMA. The inclusion of this new subsection is intended to remove ambiguity.

Item 73A – Paragraph 106A(2)(b)

Section 68A of the Act states that the issue of an apparatus licence is taken to be an acquisition for the purposes of section 50 of the *Competition and Consumer Act 2010*. This item amends paragraph 114A(2)(b) to make clear that the full suite of remedies available under that Act are available should the issuance contravene section 50 of the *Competition and Consumer Act 2010*.

Item 73B – Paragraph 114A(2)(b)

Section 114A of the Act states that an authorisation to use spectrum under an apparatus licence is taken to be an acquisition for the purposes of section 50 of the *Competition and Consumer Act 2010*. This item amends paragraph 114A(2)(b) to make clear that the full suite of remedies available under that Act are available should an authorisation contravene section 50 of the *Competition and Consumer Act 2010*.

Items 73C and 73D – Section 115 – Determinations limiting authorisation of third party users

This section provides that ACMA may, through legislative instrument, determine classes and circumstances of persons who must not be authorised to operate a radiocommunications device. These items provide that ACMA may confer a power to make a decision of an administrative character on a person.

Items 73E and 73F – Section 119 – ACMA to determine the need for qualified operators

This section provides that ACMA may determine, by written instrument, the need for operators of classes of transmitter licences to be qualified. These items provide that ACMA may confer a power to make a decision of an administrative character on a person.

Item 74—Section 129—Applications for renewal of apparatus licences

This item sets out the revised application process for the renewal of apparatus licences.

This section enables an apparatus licence holder to apply for a renewal of their licence, with the exception of transmitter licences issued under section 101A and 102 and non-foundational digital radio multiplex transmitter licences. If there is a renewal application period for the licence, the application must be made within that period. If there is no renewal application period for the licence, then the application must be made within the beginning 6 months before the licence is due to expire, and 60 days after the licence expires. Applications for renewal will not be eligible outside of this timeframe.

Subsection 129(4) provides that licensees are required to apply in a manner approved by ACMA, in a form approved by ACMA, and that the application form be accompanied by any information and documentation requested by ACMA. This includes applications in electronic form, as per section 304.

Subsection 129(5) provides that ACMA may approve different forms of application for different licences. This includes applications in electronic form, as per section 304.

Subsection 129(6) provides that ACMA may, by legislative instrument, specify the information required for the purposes of subsection 129(4).

Subsection 129(7) provides that ACMA may, by legislative instrument, specify the documents required for the purposes of subsection 129(4).

ACMA may, by notifiable instrument, specify the manner and form in which applications can be made including that an approved form of application can provide for verification through statutory declarations of statements made in an application.

Subsection 129(10) specifies that renewal can be made as a deemed application if ACMA presents a person with a notice that is expressed to be an apparatus licence renewal notice and specifies the due amount and payment date and the person pays the amount by the due date then the person is taken to have made an application for licence(s) renewal, and the requirements outlined in subsection 129(4) do not apply. A deemed application is considered to be an application for an apparatus licence for the purposes of this Act and also applies beyond this Act.

Section 129A—Further information

This section provides that if an application is made for the renewal of an apparatus licence, then ACMA may request further information in connection to the application. ACMA must notify the licensee in writing of the request. If information is requested by ACMA, the licensee must present this within the period specified by ACMA. Should the licensee fail to present the requested information to ACMA by the specified date, then ACMA may present them with a written notice outlining ACMA's refusal to further consider or action the renewal application.

Item 75—Subsection 130(1)—Renewing apparatus licences

This subsection provides that ACMA may renew an apparatus licence by issuing a new licence to the applicant. This item updates the language to include the term 'for the renewal of an apparatus licence' after the term 'made', to clarify the function performed by ACMA in this section.

Item 76—Subsections 130(2C)—(2F)—Renewing apparatus licences

This section details the matters that ACMA must consider in deciding whether to renew an apparatus licence.

The renewal of an apparatus licence is conditional on the terms supplied within the renewal statement. For example, if the renewal statement of an apparatus licence includes stipulations on specified circumstances that must be met, then renewal of the licence cannot be considered unless ACMA is satisfied that the licensee has met those specified circumstances. Similarly, if the renewal statement of a licence included the condition that the licence could not be renewed, then that licence is ineligible for renewal based upon the renewal statement.

An apparatus licence is able to be renewed for a period of up to 20 years. If the renewal period for a licence is 10 years or longer, then ACMA must be satisfied that it is in the public interest to renew the licence for that period. Similarly, if the renewal statement included a public interest statement, then ACMA must not renew that licence unless it deems it to be in the public interest to do so. The public interest is outlined in further detail in section 65A (for spectrum licences) and section 103A (for apparatus licences).

Item 77—Paragraph 130(3)(b)

This item adds matters under Subsection 100(4C) to the list of matters ACMA may have regard to in deciding whether to renew an apparatus licence. Subsection 100(4C) is dealt with by Item 63 of this Schedule to the Bill and is intended to grant ACMA the discretion to consider the aggregate parts of the spectrum an applicant has access to under transmitter licences or spectrum licences as part of deciding whether to issue an apparatus licence.

Item 78—Subsection 130(3A)—Renewing apparatus licences

This subsection stipulates that in deciding whether to renew an apparatus licence, there are factors that ACMA may take into consideration when coming to that decision. This includes whether the applicant has an outstanding liability, whether the conditions of the licence have been contravened, and whether the applicant has held another licence that was cancelled during the previous 2 years (otherwise than under section 87, 128B, 153H or 307). This includes whether the applicant was aware, or reasonable ought to be aware, of a contravention and reasonable steps to prevent the contravention were not taken. This is additional to what is currently drafted in Section 130, including Subsection 130(3) and the relevance of Sections 100(4), 100(5) and 100(6) in making a decision whether to issue a licence.

Item 79—Subsection 131AA(3)—Applications for transfer of apparatus licences

This section sets out the processes for applications for the transfer of apparatus licences and provides that ACMA may approve different forms for different types of licence.

Items 79A and 79B—Section 131AC—Apparatus licences not transferable in certain circumstances

This section provides that ACMA may, through legislative instrument, determine that particular apparatus licences are not transferable. These items provide that ACMA may confer a power to make a decision of an administrative character on the ACMA.

Item 79C—Subsection 133(3)

This item inserts a new Subsection 133(3), which adds that a condition included in a class licence may confer a power onto a person or ACMA to make a decision of an administrative character. This Bill includes a number of provisions that enable ACMA to empower itself and others to make administrative decisions. These additional express powers are not intended to impact the powers that ACMA previously had to confer such powers, with this provision avoiding doubt about whether such a power exists after the amendments made by this Bill.

Item 80—Subsection 138(1)—Parts of the spectrum allocated for spectrum licences

Subsections 138(1) and 138(1A) set out the circumstances in which ACMA must not issue a class licence, namely, where a spectrum licence authorises the operation of radiocommunications device in the same parts of the spectrum. If ACMA chooses to issue a class licence, it must ensure that the class licence does not operate at the frequency or within the area of a spectrum licence, or within the frequencies or areas set out in a marketing plan for the issuance of spectrum licences.

Item 81—Subsection 138(2)—Class licences

Item 81 amends the wording of Subsection 138(2) to clarify that the provisions set out in the subsection apply specifically to class licences that fall under Subsection 138(1) or Subsection 138(1A).

Subsection 138(2) of the Act provides certain limited exceptions, such that a class licence can be issued following consultation, in circumstances where ACMA considers it to be in the public interest and if ACMA is satisfied that it will not cause unacceptable levels of interference.

Item 82—Subsection 153A(2)—Outline of Part 3.6

Part 3.6 of the Act deals with the re-allocation of encumbered spectrum, which provide for the cancellation of apparatus licences within a specified part of the spectrum, with those parts to be re-allocated by spectrum licences or by apparatus licences that are issued in accordance with a price based allocation system.

Amendments to this Part would make ACMA, rather than the Minister, the decision-maker with regards to re-allocation declarations. The amendment clarifies the role and powers of the Minister and ACMA in this Part.

Item 83—At the end of subsection 153A(3)—Outline of Part 2.6

This item provides that parts of the spectrum subject to a spectrum re-allocation declaration may be re-allocated by a combination of spectrum licences (under Subdivision B of Division 1 of Part 3.2) and apparatus licences (under Division 2 of Part 3.3).

Item 84—Subsection 153B(1)—Spectrum re-allocation declaration

This section provides the power to make a spectrum re-allocation declaration. This item amends this power so that ACMA becomes the decision maker for a spectrum re-allocation declaration.

Items 85 and 86—Section 153B—Spectrum re-allocation declaration

These items specify the revised time periods related to the re-allocation period for spectrum licences.

These items reduce the minimum re-allocation period from two years to one. This allows ACMA greater flexibility and assists in the reducing delays for licensees and spectrum users, in re-allocation processes where a short re-allocation period is appropriate. Item 86 removes the requirement for the re-allocation deadline to be at least 12 months before the end of the re-allocation period, while maintaining the requirement for the re-allocation declaration to specify the re-allocation deadline, as a way of providing transparency for licensees that might be affected. Given the proposed changes to the minimum re-allocation period, the existing requirement for the re-allocation deadline would no longer be appropriate.

Item 87—Subsection 153B(6)—Spectrum re-allocation declaration

This amendment increases the flexibility of a spectrum re-allocation declaration by adding the option of a combination of spectrum licences (under Subdivision B of Division 1 of Part 3.2) and apparatus licences (under Division 2 of Part 3.3).

Item 88—Subsection 153B(10)—Spectrum re-allocation declaration

This item clarifies that a spectrum re-allocation declaration is a legislative instrument, as set out in Subsection 153C(3) before being repealed by Item 89 of this Schedule to the Bill. As a legislative instrument, a spectrum re-allocation declaration is subject to the various scrutiny, consultation and publication requirements that are attached to these under the Legislation Act.

Items 89—90—Sections 153C, 153E, 153F and 153G—Processes for making a spectrum re-allocation declaration

These items repeal sections 153C, 153E, 153F and 153G that dealt with matters that are no longer relevant as ACMA has replaced the Minister as the decision-maker for spectrum re-allocation declarations.

The repeal of Section 153G does not remove the requirement that ACMA undertake appropriate consultation before making a spectrum re-allocation declaration. As a spectrum re-allocation declaration is a legislative instrument, ACMA would be required to conduct consultation as appropriate and reasonably practicable, as part of the process of making the instrument.

Item 91—Subsections 153J(1) and (2)—Revocation and variation of spectrum re-allocation declaration

This section provides for the variation and revocation of a spectrum re-allocation declaration. Consequential to amendments that provide for ACMA to be the decision maker for these declarations, this item replaces references to the ‘Minister’ in these subsections with ‘ACMA’.

Items 92 and 93—Section 153J—Variation of spectrum re-allocation declarations

As the decision-maker for spectrum re-allocation declarations under these proposed amendments, ACMA would have the power to vary and revoke re-allocation declarations. However, in acknowledgement of the impost it would be on industry and licensees if a re-allocation declaration were to be varied after the allocation of licences had already commenced, the amendment proposed by Item 92 requires ACMA to be satisfied that there are exceptional circumstances that warrant the variation, before being able to vary a re-allocation declaration after the allocation of licences has begun.

Item 93 clarifies that the restrictions imposed by Item 92 and the rest of Section 153J of the Act do not limit ACMA’s power to vary spectrum re-allocation declarations in accordance with subsection 33(3) of the Acts Interpretation Act 1901. This subsection of the *Acts Interpretation Act 1901* means that where an Act confers a power to make a legislative instrument, this includes the power to repeal, revoke or vary it.

Item 94—Subsection 153K(5)—Automatic revocation of spectrum re-allocation declaration if no licences allocated by re-allocation deadline

This section provides for the revocation of a re-allocation declaration where no licences are allocated prior to the re-allocation deadline. Consequential to amendments that provide for ACMA to be the decision maker for these declarations, this item replaces references to the ‘Minister’ in these subsections with ‘ACMA’.

Items 95—98—Sections 153L and 153M—Reallocation by means of issuing spectrum licences and re-allocation by means of issuing apparatus licences

Sections 153L and 153M make provision for the reallocation by means of issuing spectrum licences and re-allocation by means of issuing apparatus licences, respectively. These items amend subsections 153L(1), 153L(2) and 153M(1) so that it is clear that parts of the spectrum may be reallocated through the issue of an apparatus licence, the issue of a spectrum licence, or by a combination of issuing spectrum and apparatus licences.

Item 99—Subsection 153N(1)—Restriction on issuing spectrum licences for parts of the spectrum subject to re-allocation

This section restricts ACMA from issuing spectrum licences in the parts of the spectrum subject to re-allocation during the re-allocation period, unless the licence is to be issued pursuant to the re-allocation or where it had already been allocated prior to the declaration being made. Consequential to amendments that provide for ACMA to be the decision maker for these declarations, this item replaces references to the ‘Minister’ in this subsection with ‘ACMA’.

Item 100—Subsection 153P(3)—Restriction on issuing apparatus licences for parts of the spectrum subject to re-allocation

Item 100 repeals the general prohibition on ACMA issuing apparatus licences in parts of the spectrum that have been subject to a re-allocation process. This would be consistent with the intent of giving ACMA more discretion in allocation processes and would also prevent parts of the spectrum from becoming necessarily ‘locked’ into spectrum licensing in a way that would not allow flexibility to adapt to changing spectrum needs and uses in the future.

Items 101 and 102—Paragraphs 285(d) and (f)

Section 285 provides for the reconsideration and review of certain decisions by ACMA. These items provide that the refusal to renew a spectrum licence, or renewal of a spectrum licence with different conditions, under section 77C and the variation of an apparatus licence under section 103C are decisions subject to reconsideration and review.

Items 103—107—Section 286—Deadlines for reaching certain decisions

Where a provision of the Act provides for a person to make an application to ACMA, this section provides for the decision to be made within 90 days of the application. These items include exceptions to section 286, consequential to the amendments related to the renewal of licences.

Item 104 provides that, where ACMA has requested additional information from an applicant for the renewal of an apparatus licence, the 90 day period commences when that information is received.

Item 107 provides that where ACMA receives an application for the renewal of a spectrum licence and there is a renewal decision-making period statement in the licence, ACMA must make a decision within the specified period. However, if ACMA requests further information from the applicant within that period, then the period is extended by the number of days in between ACMA requesting the additional information and the information being provided by the applicant.

Item 107 also provides that where ACMA receives an application for the renewal of a spectrum licence and there is no renewal decision-making period statement in the licence, it must make a decision either within 6 months after receiving the application; or if ACMA has, requested additional information from the applicant, within 6 months after receiving that further information. If ACMA has not informed the applicant of a decision before the end of the 6 months, it is taken that the decision is a refusal, which is a reviewable decision.

Where ACMA does not make a decision within the prescribed timeframe and an application for renewal is deemed to be refused, ACMA must provide the applicant with an explanation as to why the decision was not made within the timeframe.

Item 108—Sections 304 and 304A—Applications in electronic form

This item provides for the term ‘in writing’ in relation to the application process to encompass electronic forms and online systems and empowers ACMA to require an application to be made in an electronic form. The application is valid so long as it is in a form approved by ACMA, and has effect despite the stipulations in the *Electronic Transactions Act 1999* that an applicant would ordinarily be required to consent to the information being given electronically.

Part 2—Application and Transitional Provisions

Item 109—Transitional—marketing plans

Item 109 provides transitional arrangements and savings provisions for existing marketing plans, given the changes to Section 39 of the Act and the repeal of Section 36. These provisions clarify that marketing plans prepared under the Act before the commencement of the amendments are still valid once the amendments to the allocation process, including the removal of designation, come into force. It preserves references to a designation notice, as if they were references to those notices as in force immediately before the commencement of this item. It also clarifies that Subsection 39(2), as amended by this Schedule, does not apply to any marketing plan saved under this provision.

Item 109A – Application—section 48 of the *Radiocommunications Act 1992*

This item provides that the amendments of section 48 made by this schedule apply to instances of possession of a radiocommunications device after the commencement of the amendments.

Item 110—Transitional—paragraphs 60(5)(a) and (b) of the *Radiocommunications Act 1992*

Paragraphs 60(5)(a) and (b), which deal with allocation limits, are repealed and replaced by provisions that clarify the potential scope of allocation limits. This item provides for any allocation limits in place for allocation processes underway at the commencement time continue to apply despite the repeal of those paragraphs.

Item 111—Transitional—spectrum licences issued under Subdivision A of Division 1 of Part 3.2 of the *Radiocommunications Act 1992*

Subdivision A of Division 1 of Part 3.2 of the Act and the concept of conversion processes as a whole are repealed by other items within this Schedule of the Bill. Item 111 provides that any licences that had been issued under this Subdivision, as part of a past conversion process, continue to be valid. This will provide certainty and continuity for licensees that are operating under such licences.

Item 112—Transitional—issuing spectrum licences under Subdivision A of Division 1 of Part 3.2 of the *Radiocommunications Act 1992*

Item 112 sets out transitional arrangements for conversion processes underway under Subdivision A of Division 1 of Part 3.2 of the Act when the items repealing the subdivision commence.

Similar to the provisions currently set out in Subsection 36(8) of the Act, Item 112 means that if an offer of a licence had already been made under Section 56 before it was repealed by other Items in this Schedule, the licensee would still be able to accept the offer and ACMA would be authorised to issue a licence in response to that acceptance. If the licensee does not accept the offer (either by notifying ACMA or by failing to accept the offer by the required date), this item also allows ACMA to allocate the spectrum and issue a licence as set out in the Subdivision, as if it had not been repealed.

Item 113—Transitional—subsection 71A(3) of the *Radiocommunications Act 1992*

This transitional item provides that the exception to section 71A(3), so that the re-issue of a spectrum licence is not considered to be an acquisition or conduct for the purposes of the *Competition and Consumer Act 2010*, continues to apply in relation to any licences re-issued under section 82 despite the repeal of that section.

Item 114—Transitional—spectrum licences re-issued under section 82 of the *Radiocommunications Act 1992*

Section 82 of the Act is repealed by the provisions of this Schedule, replaced by the provisions of Division 3A of Part 3.2. This item provides that any licences that had been issued under this section continue to be valid. This will provide certainty and continuity for licensees that are operating under such licences.

Item 115—Application—section 99 of the *Radiocommunications Act 1992*

This Schedule to the Bill makes amendments to Section 99 in relation to applications for apparatus licences, particularly in relation to their form. This item provides that these amendments only apply to applications made after the commencement of these provisions.

Item 116—Transitional—subsection 99(2) of the *Radiocommunications Act 1992*

This Schedule amends subsection 99(2) so that applications for an apparatus licence must be made in a manner approved in writing by ACMA. This item provides that these amendments do not affect the ongoing validity of a written approval that was given prior to the commencement of these amendments.

Item 117—Transitional—subsections 106(3) and (4) of the *Radiocommunications Act 1992*

Subsections 106(3) and 106(4) of the Act relate to allocation limits in price-based allocations of certain transmitter licences. These provisions would be repealed and substituted by Item 68 of this Schedule to the Bill. Item 117 enables those provisions to continue to apply as currently set out in the Act for processes that were in place before the commencement of this item. This will provide continuity and certainty for allocation processes underway at the time of commencement and prevent unnecessary delays or disruptions.

Item 118—Transitional—section 129 of the *Radiocommunications Act 1992*

This item repeals section 129, and replaces it with a new provision that deals with applications for the renewal of an apparatus licence. This item provides that the repealed section 129 continues to apply to applications for renewal made before the commencement of the amendments as if the repeal had not happened.

Item 119—Application—section 131AA of the *Radiocommunications Act 1992*

This item amends section 131AA so that applications for the transfer of an apparatus licence no longer need to refer to the type of the licence, consistent with the amendments to section 98. This item provides that these amendments apply to applications made after the commencement of the amendments.

Item 120—Transitional—spectrum re-allocation declarations

This item amends provisions in Part 3.6 of the Act and manner in which spectrum re-allocation declarations are made, varied and revoked. The item provides transitional arrangements for spectrum re-allocation declarations made prior to the commencement of the amendments under the Section 153B of the Act, in order to provide continuity and avoid disruption to any re-allocation processes that may be underway at the date of commencement.

This item provides that any declarations made before the commencement of the amendments will be taken to have been made by ACMA, as the rule-maker for spectrum re-allocation declarations under the amendments proposed by this Schedule to the Bill. ACMA would also have the power to vary and revoke the declaration. The item also provides that the declaration will continue to be valid and be considered to satisfy any requirements imposed by the Act or the Legislation Act.

SCHEDULE 4—EQUIPMENT ETC.

Schedule 4 of the Bill confers on ACMA certain powers around equipment rules and related provisions. This includes the power for ACMA to make equipment rules that prescribe standards of equipment, and impose obligations or prohibitions in relation to equipment. This extends to the operation, supply, offer to supply, possession and/or importation of equipment, labelling and use of protected symbols. Part 4.1 outlines the role, responsibility and powers of ACMA in relation to interim or permanent bans on equipment. This Part also stipulates the legal requirements for those parties involved in the operation, supply, offer to supply, possession and/or importation of equipment, including the mandatory recall of equipment, and mandatory notification to ACMA in the instance of voluntary recalls of equipment.

For the purposes of the new Part 4.1, equipment means:

- A radiocommunications transmitter; or
- A radiocommunications receiver; or
- Anything designed or intended for radio emission; or
- Anything irrespective of its use or function for the purpose of its design that is capable of radio emission; or
- Anything that has a use or function that is capable of being interfered with by radio emission.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Subparagraph 4(d)(i)

Section 4 sets out an outline of the matters that are dealt with by the Act. This item amends subparagraph 4(d)(i), so that it will no longer refer to standards under the Act, and instead will refer to the equipment rules, consequential to the amendment in item 24.

Items 2-17—Section 5—Definitions

These items amend the definitions provision of the Act so that it no longer refers to terms that are used in Part 4.1 prior to the amendments contained in this Bill. These repealed definitions include the definitions of ‘apply’, ‘EMC Standard’, ‘non-standard device’, ‘non-standard transmitter’, and ‘standard’. The definitions of ‘device’, ‘interference’, ‘label’, ‘permit’, and ‘register’ have been updated to provide definitions consistent with the operation of the provisions of Part 4.1 contained in the Bill. New definitions of ‘designated radiocommunications receiver’, ‘equipment’, ‘equipment rules’, ‘interim ban’, ‘offer to supply’, ‘operate’, ‘permanent ban’, ‘protected symbol’ and ‘recall notice’ are inserted into the Bill to provide definitions for the terms used in the new Part 4.1.

The definition of a ‘label’ includes a QR code, which is a barcode capable of linking to a URL to provide further information that meets the labelling requirements. Things similar to a QR Code, which enable linking to further information are also captured by this definition of a ‘label’.

Item 18—Subsection 6(2)—Definition of radiocommunication

Section 6 of the Act defines radiocommunication for the purposes of the Act, which includes radio emission and the receipt of radio emission, including communication in the form of a radar device. Consistent with the changes elsewhere in this schedule, ‘radar device’ is amended to refer to ‘radar equipment’.

Item 19—Section 7A—Designated radiocommunications receiver

Item 19 inserts section 7A into the Act to define a designated radiocommunications receiver. The amendments made by item 24 provide ACMA with the power to make equipment rules with respect to ‘designated radiocommunications receivers’, which are defined to be all radiocommunications receivers that are not authorised by a class licence.

Item 20—Section 9 and 9A—Application of Labels

Item 20 repeals the definition of devices that are now incorporated into the definition of ‘equipment’ in section 5. Section 9A is replaced by the new section 9 which replicates the existing definition of applying a label.

Item 21—Paragraph 107(1)(d)—General conditions of apparatus licences

Section 107 provides the general conditions of apparatus licences, which includes that devices used under the licence must comply with applicable standards. Item 21 amends this paragraph so that it refers to the equipment rules, which will be the source of the power to issue standards under the amendments in the Schedule.

Item 22—Paragraph 133(2)(e)—Conditions of class licences

Section 133 provides the conditions of class licences which includes that devices used under the licence must comply with applicable standards. Item 22 amends this paragraph so that it refers to the equipment rules, which will be the source of the power to issue standards under the amendments in the Schedule.

Item 23—Subsection 154(2)—Outline of Chapter 4

Section 154 provides an overview of Chapter 4 of the Act. The overview of the Chapter is amended so that it sets out that Part 4.1, inserted by item 24, is about equipment rules, protected symbols, equipment bans and equipment recall.

Item 24—Part 4.1—Equipment

Item 24 repeals the current Part 4.1 of the Act and inserts a new Part 4.1 that deals with equipment.

Division 1—Introduction

This division provides ACMA with the broad power to make equipment rules to regulate the operation and supply of equipment. These rules provide detail about how the regulation of equipment will operate. The division also sets out the framework for penalties for breaching the equipment rules and exemptions from the requirements of the equipment rules.

Section 155—Simplified outline of this Part

Section 155 provides a simplified outline of Part 4.1 of the Act.

Division 2—Equipment rules

Section 156—Equipment Rules

This section stipulates that ACMA may, by legislative instrument, make equipment rules, and ACMA may make more than one set of equipment rules. The equipment rules must be directed towards achieving some or all of the listed objectives, including ensuring the electromagnetic compatibility of equipment, containing interference and ensuring radiocommunications transmitters are supplied only to people authorised to operate them.

ACMA is able to make multiple equipment rules that pertain to different kinds and classes of persons or equipment. Equipment that is not a radiocommunications device is able to be impacted by, or to impact on, radiocommunications devices. For example, the equipment rules may be used to establish rules directed toward preventing interference between radiocommunications devices and fixed line internet services, with other electronic equipment such as audio systems.

Section 157—Constitutional Limits

This section is designed to support the operation of the equipment rules by stipulating their constitutional limits. Under this section equipment rules can only be made if they are supported by one or more of the provisions of the Constitution stipulated in this section.

Section—158—Standards

This section prescribes that the equipment rules may set standards for equipment, and as such may require particular things of the equipment in order for equipment to meet that standard. This extends to the design features and the performance requirements of the equipment. Subsection (3) provides that a standard may be applied broadly or be more limited in its application. The inclusion of subsection (3) does not limit subsection 33(3A) of the *Acts Interpretation Act 1901* which details the scope of powers with respect to particular matters.

For example, ACMA may make equipment rules prescribing standards for the maximum permitted levels of radio emissions for equipment. The maximum permitted level of radio emissions from equipment would be expected to be determined according to the type of device and the use of the device in consideration of electromagnetic energy (EME) and human safety. This would be determined in consultation with the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) and be set in accordance with international standards such as those determined by the European Telecommunications Standards Institute (ETSI), the International Electrotechnical Commission, and the International Organisation for Standardisation (ISO).

Standards prescribed in the equipment rules in accordance with this section would be accompanied by obligations or prohibitions determined for the purposes of section 159. Such obligations or prohibitions would require compliance with the standards when undertaking certain conduct. For instance, the supplier of certain equipment may be prohibited from supplying a specified kind of device if it does not comply with the standard prescribed in accordance with this section.

Section 159—Obligations, prohibitions and permits

This section outlines the obligations or prohibitions that ACMA may impose in relation to equipment. The powers of ACMA extend to quality assurance, testing, labelling, record keeping, and compliance with the legislative rules. Prohibitions and obligations may be imposed by ACMA for equipment rules relate to the operation, supply, offer to supply, possession or importation of equipment.

This section prescribes that the rules may require that a thing (as stipulated by the equipment rules) is able to be done by either a specified person, a person holding accreditation of a specified kind, or a person who satisfies the conditions of the equipment rules and is approved, in writing, by a person holding an accreditation of a specified kind. Further, ACMA has the power to prohibit a person from the supply or offer to supply of a specified kind of equipment unless the person satisfies one or more specified conditions.

Under this section, ACMA has the power to stipulate in the equipment rules requirements around publishing of information on supplier websites. It has this power provided that the equipment rules relate to the supply or offer to supply of equipment. This includes the provision that suppliers must ensure that before equipment is supplied to a person, the supplier must draw that person's attention to material that is on the supplier's website, and the supplier should provide this person with evidence that the equipment complies with specified requirements. ACMA may prohibit a person who supplies or offers to supply equipment from publishing a specified kind of material about the equipment on the person's website unless the person does so in specified circumstances.

Under this section, equipment rules may prohibit a person from applying a specified kind of label to equipment unless a person does so in a specified circumstance.

This section allows that the equipment rules may prohibit a person from doing an act or thing specified by the legislative rules.

This section further stipulates the requirements and extent of powers of permits. Through this section, the equipment rules may prohibit the doing of an act or thing by a person unless the person holds a permit issued under the equipment rules by ACMA, and the permit authorises said person to do that act or thing. The conditions of the permit must be adhered to, and if the conditions are not met then the act or thing is no longer authorised.

The equipment rules may make a provision for the issue of permits by ACMA, for ACMA to include conditions in a permit, and the cancellation of permits by ACMA. All decisions made under these provisions are reviewable under Part 5.6.

This section provides that the equipment rules are capable of providing powers to ACMA to vary a permit by adding to the conditions of the permit, varying the existing conditions of the permit, or removing the conditions of the permit. These decisions are reviewable under Part 5.6.

Section 160—Breach of equipment rules and permit conditions

This section outlines what an offence under section 160 is deemed to be, and the penalties associated with this offence.

Under this section, a person is considered to have committed an offence if the person is subject to a prohibition imposed by equipment rules and the prohibition in question does not consist of contravening a condition of a permit. If this is the case and the person engages in conduct that contravenes the prohibition, then they are considered to have committed an offence. The penalty unit is 500 units.

Under this section a person is considered to commit an offence if the person is subject to requirements made under equipment rules, and does not comply with the obligations or requirements stipulated under the equipment rules. Should a person engage in conduct and this conduct be determined to be in contravention of an obligation, then they are considered to have committed an offence. The penalty unit is 500 units.

For failure to meet obligations related to doing an act or thing within or before a particular time period, an additional penalty applies wherein the maximum penalty for each day that an offence continues is 10% of the maximum penalty that could be imposed in respect to the principal offence.

This section also outlines civil penalties. If a person is subject to a prohibition in relation to the equipment rules, that person must not contravene the prohibition, provided that the prohibition does not consist of contravening a condition of a permit. The civil penalty for this is 500 units.

If a person is subject to an obligation imposed by the equipment rules, then the person must not contravene this obligation. The civil penalty for this is 500 units.

For failure to meet obligations related to doing an act or thing within or before a particular time period, an additional penalty applies wherein the maximum penalty for each day that the offence continues is 10% of the maximum penalty that could be imposed in respect to the principal offence.

For failing to meet obligations related to the keeping or retaining of records, the civil penalty unit is 30 penalty units.

If a person is the holder of a permit, the person must not contravene a condition of the permit. The civil penalty for this is 100 penalty units. This does not apply if the person is deemed to have a reasonable excuse. The burden of proof related to this reasonable excuse lies with the person who is the holder of the permit (see section 96 of the Regulatory Powers Act).

Section 161—Equipment rules may confer powers on ACMA

This sections allows that the equipment rules may make provisions in relation to a matter by conferring a power on ACMA. For example, under this Section ACMA may choose to list overseas compliance information that can be used to demonstrate compliance with particular national standards. This provides flexibility for the management of equipment rules by ACMA. Section 162—Equipment rules may confer powers on accredited persons

Under this section, the equipment rules may make a provision in relation to a matter, and by doing so confer a power onto a person, provided that person holds a specified kind of

accreditation. This person may charge fees in relation to the exercise, so long as that fee does not amount to taxation.

Section 162—Equipment rules may confer powers on accredited persons

This section provides that the equipment rules may, as part of a provision on a specific matter, confer a power on a person who holds a specified kind of accreditation. The person who holds this accreditation may charge a fee, provided that that fee does not amount to taxation.

Section 163—Equipment rules may authorise the charging of fees by certain persons

This section provides that should a specified person or a person who has been approved by a specified person be sought in relation to a matter, so long as that matter is something they are authorised to do under the rules as outlined in Section 159, these persons may charge a fee, provided that that fee does not amount to taxation.

Section 164—Divisions 4 and 5 do not limit ACMA's power to make equipment rules

This section stipulates that Divisions 4 and 5, dealing with bans and recalls of equipment, do not limit ACMA's powers to make equipment rules.

Division 3—Protected symbols

Section 165—Use or application of protected symbols

This section prohibits a person from using or applying a protected symbol, or a symbol that so closely resembles a protected symbol that it could be mistaken for one, in specified circumstances. Full details of the circumstances are outlined in this section, and include its use in relation to goods or services, the promotion of supply or use of goods or services, or applying it as a trade mark or otherwise to goods. This power extends to symbols that are intended to be used internationally as well as nationally (i.e. within and across the states and territories). The civil penalty for this is 50 penalty units.

This section prohibits a person from using or applying a protected symbol, or a symbol that so closely resembles a protected symbol that it could be mistaken for one, in a number of contexts as outlined in Section 165(5). This includes, but is not limited to, using in relation to a business, trade, profession or occupation, using in relation to goods or services, or the promotion of supply or use of goods or services, and applying as a trade mark or otherwise to goods imported, manufactured, produced, sold, offered for sale or let on hire.

The above provisions do not apply to a person who uses or applies a protected symbol for the purposes of labelling equipment in accordance with a determination made by ACMA, the equipment rules, labelling customer equipment (as defined in the Telecommunications Act 1997) or customer cabling (as defined by that Act) in accordance with section 407 of that Act. The equipment rules may provide that the above provisions do not apply in relation to a specified use or application of a protected symbol.

Section 166—Protected symbols

This section provides that for the purposes of the Act, the term *protected symbol* means a symbol which has a design as set out in a legislative instrument provided by ACMA, and the purpose of which is to indicate compliance by equipment with and standards that are prescribed by the equipment rules and are applicable to the equipment.

For the purposes of this Act, if a label is applied to equipment and embodies a symbol as outlined above, then that label will be taken to indicate that the equipment meets the requirements of any standards that are prescribed by the equipment rules and are applicable to the equipment.

Division 4—Bans on equipment

Subdivision A—Interim bans

Section 167—Interim bans on equipment

Under the proposed Section 167, ACMA would be able to impose an interim ban on equipment of a specified kind if ACMA believes equipment of that kind is designed to have an adverse effect on radiocommunications; that a reasonably foreseeable use or misuse of equipment of that kind would be likely to substantially interfere with, disrupt or disturb radiocommunications; or if the equipment is a radiocommunications transmitter and ACMA has reasonable grounds to believe that radio emissions resulting from operation of that equipment would be likely to adversely affect the health or safety of individuals.

Subsection 167(3) provides that if ACMA imposes an interim ban, ACMA would have to publish a notice containing details of the ban including the time when the ban commences, the kind of equipment to which the interim ban relates and the reasons for issuing the ban.

The notice would need to be published on ACMA's website and the legislative rules may set out additional requirements of ACMA to publish a notice. However, a failure of ACMA to publish such a notice on their website is not intended to invalidate an interim ban. The requirement of ACMA to publish an interim ban on its website is intended to provide increased transparency and awareness amongst radiocommunications users. The power conferred on ACMA to impose an interim ban on equipment is by way of notifiable instrument. Notifiable instruments are required to be registered on the Federal Register of Legislation, and these publication requirements are in addition to that requirement

Section 168—Duration of interim bans

This section stipulates that an interim ban imposed by ACMA comes into force on the start day specified in the instrument imposing the ban, and subject to the Act, remains in force for 60 days. If an interim ban is in force, ACMA may, by notifiable instrument, extend the period for which the ban is in force by a period of up to 30 days. The inclusion of this section does not limit the power under 33(3) of the Acts Interpretation Act 1901.

Section 169—Revocation of interim bans

Under section 169, if an interim ban is in force, ACMA may by notifiable instrument revoke the ban. Should this take place, the revocation takes effect on the day specified in the instrument. This section also provides that an interim ban is taken to be revoked if a permanent ban on equipment of the same kind comes into force. The inclusion of this section does not limit the power under 33(3) of the Acts Interpretation Act 1901.

Section 170—Compliance with interim bans

This section imposes prohibitions on the operation of, or, in certain circumstances, the supply, or offer to supply of equipment subject to an interim ban, for this Division only. This means that they are not to be utilised for other common law purposes. These are civil penalty provisions subject to a maximum penalty of 200 penalty units.

Under this section, a person must not operate equipment, or supply or offer to supply equipment of a particular kind to another person if there is an interim ban on that kind of equipment in force and the other person intends to operate that equipment.

If a person is found to contravene any of the above and another person suffers loss or damage because of a reasonably foreseeable use or misuse of the equipment, the other person is taken to have suffered loss or damage because of the contravention.

Section 171—Actions for damages

This section outlines that if a person suffers loss or damage because of conduct engaged in by another person, and the conduct contravened any of the compliance provisions in section 170, then the person may recover the amount of the loss or damage through either the Federal Court or the Federal Circuit Court of Australia against that other person or any further persons involved in the contravention. A person is considered to have been involved in a contravention if they fall under the criteria listed in this section.

The recovery of this loss or damage must be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

Subdivision B—Permanent bans

Section 172—Permanent bans on equipment

This section provides that ACMA may, by legislative instrument, impose a permanent ban on equipment of a specified kind. In issuing a permanent ban, ACMA must be satisfied that the equipment is designed to have an adverse effect on radiocommunications, or that use or misuse of the equipment would substantially interfere or disrupt radiocommunications, or, should the equipment consist of transmitters and following consultation with ARPANSA, that the operation of the equipment would adversely impact the health or safety of individuals.

If ACMA imposes a permanent ban, ACMA must publish a notice containing details of the ban including the time when the permanent ban commences, the kind of equipment to which the permanent ban relates and the reasons for issuing the ban. The notice must be published on ACMA's website and the legislative rules may set out additional requirements of ACMA in publishing a notice.

However, a failure of ACMA to publish a notice on their website does not invalidate a permanent ban. The requirement of ACMA to publish a permanent ban on its website is

intended to provide increased transparency and awareness amongst radiocommunications users. This provision is in addition to the requirements under the Legislation Act that legislative instruments be registered on the Federal Register of Legislation and tabled in the Parliament. Legislative instruments are required to be registered on the Federal Register of Legislation, and these publication requirements are in addition to that requirement.

As a legislative instrument, the requirements under section 17 of the Legislation Act also mean that ACMA, as the instrument-maker, must be satisfied that appropriate consultation has occurred before imposing a permanent ban.

Section 173—When permanent bans come into force

Section 173 provides that a permanent ban will come into force on the day specified by ACMA in the legislative instrument that imposes the ban. As a legislative instrument, a permanent ban will not be enforceable unless it is registered on the Federal Register of Legislation

Section 174—Revocation of permanent bans

Section 174 provides that a permanent ban may be revoked by legislative instrument. The revocation will take effect on the day specified by ACMA in the instrument. This Section is to be interpreted in the context of under Section 33(3) of the Acts Interpretation Act 1901, which provides the power to vary or repeal any such instrument.

Section 175—Compliance with permanent bans—offences

Section 175 imposes criminal offences on the operation of, or, in certain circumstances, the supply, offer to supply, or possession of equipment subject to a permanent ban. These offences are subject to a maximum penalty of 2 years' imprisonment, or 1,000 penalty units (or both). Contravention of a permanent ban is a serious offence as it is considered that the operation of the banned equipment is likely to have an adverse effect on radiocommunications or would emit radio emissions that would adversely affect the health or safety of individuals.

Section 176—Compliance with permanent bans—civil penalties

Section 176 contains civil penalty provisions that impose prohibitions on the operation of, or, in certain circumstances, the supply, offer to supply, or possession of equipment subject to a permanent ban. These civil penalty provisions are subject to a maximum penalty of 1,000 penalty units.

Subsection 176(5) provides that, if equipment is supplied, offered for supply, operated or possessed by a person (the first person) in contravention of these civil penalty provisions, and another person suffers loss or damage because of a reasonably foreseeable use or misuse of the equipment, the other person is deemed to have suffered the loss or damage because of the contravention of the permanent ban by the first person.

Section 177—Actions for damages

Under section 177, a person (claimant) who suffers loss because of another person's conduct that is in contravention of a permanent ban, may recover the amount of loss or damage by taking action in the Federal Court or Federal Circuit court against the contravener, or anyone involved in the contravention consistent with subsections 176(1), 176(2), 176(3) or 176(4). In relation to causation of the loss or damage, see subsection 176(5). The claimant may take action at any time within 6 years of the cause of action.

Subdivision C—Presumptions

Section 178—Presumptions

This section outlines presumptions, for the purposes of provisions requiring compliance with interim and permanent bans, relating to the purpose for which equipment supplied or offered for supply is to be used, and the purpose for which equipment is possessed.

Where a person supplies or offers to supply banned equipment to another person (or is in possession of banned equipment for that purpose), it is presumed that the other person intends to operate the equipment, unless the supplier is able to provide evidence that suggests a reasonable possibility the other person did not intend to operate the equipment. Where a person is found to be in possession of banned equipment (otherwise than for the purpose of supply), it is presumed to be in their possession for the purpose of operation, unless the person can provide evidence that suggests a reasonable possibility that they did not possess the equipment for the purpose of operating it. For the purposes of the above provisions, the equipment is considered to be operable regardless of whether it could be operated immediately or after taking one or more steps (for example, the connection of the equipment to a power supply). Contravention of any of the offences and civil penalty provisions covered by this presumption is serious, as the operation of banned equipment may cause harm to people or property.

Subdivision D—Amnesty for banned equipment

Section 179—Amnesty for banned equipment

Section 179 provides that ACMA may, by notifiable instrument, declare an amnesty period for a specified permanent ban. Under section 179, if a permanent ban on equipment is in force and an amnesty period has been declared for the ban, then the owner of equipment of that kind may agree with ACMA to forfeit the equipment to the Commonwealth. If the equipment is forfeited, the penalty provisions prohibiting possession will not apply and are taken never to have applied to the possession of the equipment by the owner or any other person. This does not excuse contravention of the supply, offer to supply or operation prohibitions.

Section 180—ACMA may take possession of equipment

Section 180 provides that if the owner of the equipment subject to a permanent ban during an amnesty period for the ban agrees to forfeit equipment to the Commonwealth during an amnesty period for the ban, ACMA may take possession of the equipment. If ACMA takes possession of the equipment, ACMA must give the owner of the equipment a receipt for the equipment taken.

Under subsection 180(2), if ACMA has purported to take possession of equipment under subsection 180(1) but ACMA was not entitled to take possession of that equipment, ACMA must take all reasonable steps to return the equipment to the owner.

Section 181—Forfeiture of equipment for the Commonwealth

Under section 181, if ACMA has taken possession of equipment and at least 90 days have passed since ACMA gave the owner a receipt for the equipment under subsection 180(1), ACMA may declare in writing that the equipment is forfeited to the Commonwealth. Section 181 provides that if ACMA makes a declaration, ACMA must provide a copy of the declaration to the owner of the equipment.

Under subsection 181(3), if the owner of the equipment agrees to forfeit a piece of equipment to the Commonwealth (under section 179) and ACMA has taken possession of the equipment (under subsection 180(1)) and ACMA has not made a declaration that the equipment is forfeited to the Commonwealth within the 120-day period after ACMA gave the owner a receipt for the equipment, then the equipment is deemed to be forfeited to the Commonwealth at the end of the 120-day period.

Under subsection 181(3), if the owner of the equipment agrees to forfeit a piece of equipment to the Commonwealth (under section 179) and ACMA has taken possession of the equipment (under subsection 180(1)) and ACMA has not made a declaration that the equipment is forfeited to the Commonwealth within the 120-day period after ACMA gave the owner a receipt for the equipment, then the equipment is deemed to be forfeited to the Commonwealth at the end of the 120 day period.

Section 182—Forfeited equipment may be sold, destroyed or otherwise disposed of

Section 182 provides that any equipment that has been forfeited under section 181 may be sold, destroyed or otherwise disposed of in accordance with the directions of ACMA. Pending a direction to sell, destroy or dispose of the equipment, the equipment must be kept in such custody as ACMA directs.

Division 5—Recall of equipment

Subdivision A—Compulsory recall of equipment

Section 183—Compulsory recall of equipment

Section 183 provides for the compulsory recall of equipment where a person in trade or commerce supplies equipment that will or may cause substantial disruption, disturbance or interference to radiocommunications; where the equipment is designed to have an adverse effect on radiocommunications; where the operation of the equipment is likely to adversely affect health or safety; or where the equipment is the subject of a permanent ban. The specific situations in which ACMA may issue a recall notice are listed in the section, and encompass use (including misuse) of equipment, supply and offer to supply of equipment, potential health impacts of equipment, and equipment that has had a permanent ban issued on it.

Subsection 183(1) provides that ACMA may issue a recall notice in relation to equipment. This can be issued if a person supplies equipment in trade or commerce and ACMA is satisfied that a reasonably foreseeable use or misuse of that equipment will or may cause substantial disruption, disturbance or interference to radiocommunications and the supplier has not taken satisfactory action to prevent that disruption, disturbance or interference.

Subsection 183(2) provides that ACMA may issue a recall notice in relation to equipment where ACMA is satisfied that the kind of equipment being supplied is designed to have an adverse effect on radiocommunications.

Under subsection 183(3) ACMA may issue a recall notice in relation to equipment where the kind of equipment being supplied consists of a radiocommunications transmitter and ACMA is satisfied that the radio emissions resulting from the operation of that equipment would be likely to adversely affect health or safety of individuals.

Subsection 183(4) provides that ACMA may issue a recall notice in relation to equipment that is the subject of a permanent ban. Subsection 183(8) provides that for the purposes of 183(1)(a), 183(1)(c), 183(2)(a), 183(3)(b), 183(4)(a) or 183(4)(c) it is not necessary for ACMA to know the identities of the suppliers of equipment in order to issue a notice.

Subsection 183(9) provides that recall notices can be issued under 183(1), 183(2), 183(3) or 183(4) even if the equipment has become fixtures since the time the equipment was supplied.

If ACMA issues a recall notice, ACMA must publish a notice containing details of the recall notice including the time when the recall notice commences, the kind of equipment to which the recall notice relates and the reasons for issuing the recall notice. The recall notice must be published on ACMA's website. The legislative rules may also set out additional requirements of ACMA to publish a recall notice. A failure of ACMA to publish a notice on their website does not invalidate a recall.

Section 184—Contents of a recall notice

Section 184 sets out the contents that may be found in the body of a recall notice and the obligations related to this. This section specifies that a recall notice may provide details on the type of action that must be taken due to the recall, and the timeframe for that action to be completed by. If a recall notice is issued, suppliers of the equipment may be obligated to perform actions based on the advice of the notice. This includes recalling the equipment, informing the public about the recall, disclosing to the public the reasons for the recall, and providing advice on how the supplier will be managing the recall. If a recall notice requires that a supplier refund the equipment, then in the instance that more than 12 months has lapsed since the equipment was purchased, the amount due to be refunded may be reduced to an appropriate sum.

Section 185—Obligations of a supplier in relation to a recall notice

Section 185 details the manner in which a supplier is required to comply with an undertaking given to repair or replace equipment as required by a recall notice. The requirements that apply will depend upon the reason why the equipment was recalled. Subsection 185(8) outlines that if the supplier undertakes to repair or modify or replace the equipment, these costs (including cost of transportation) must be paid by the supplier.

Section 186—Compliance with recall notices

Section 186 provides criminal offence and civil penalty provisions for the contravention of a recall notice. The maximum penalty for both the criminal offence and civil penalty provisions is 1,000 penalty units. Under this section, if a person (the first person) contravenes a recall notice in relation to equipment, then in the event that another person suffers loss or damage either because of a reasonably foreseeable use or misuse of the equipment that is subject to a recall notice, or a failure of the first person to provide particular information as required by the notice in relation to the equipment, the other person is deemed to have suffered the loss or damage because of the contravention by the first person.

Section 187—Actions for damages

Under section 187, a person (claimant) who suffers loss because of another person's conduct in contravention of a recall notice, may recover the amount of loss or damage by taking action in the Federal Court or Federal Circuit Court against the person who contravened the notice, or anyone involved in the contravention in accordance with subsection 187(3). The claimant may take action at any time within 6 years of the incident occurring.

Subdivision B—Voluntary recall of equipment

Section 188—Notification requirements for a voluntary recall of equipment

Section 188 requires suppliers of equipment to notify ACMA of actions taken to voluntarily recall equipment for certain reasons. This applies where the equipment is recalled because the equipment will or may foreseeably cause substantial disruption, disturbance or interference to radiocommunications; where the equipment would likely have an adverse effect on radiocommunications; where the radio emissions resulting from a reasonably foreseeable use or misuse of equipment would be likely to adversely affect health or safety; or where the equipment is subject to a permanent ban.

In these circumstances, the person must notify ACMA in a written notice that is consistent with subsection 188(4) within 2 days of making the action. A civil penalty of 20 penalty units will apply for a failure to comply with this requirement.

ACMA must publish a copy of the notice on ACMA's website. The legislative rules may also set out additional requirements of ACMA to publish a recall notice. A failure of ACMA to publish a notice on their website does not invalidate a recall.

Subsection 188(4) provides the form that a written notice must take, including the equipment concerned, the reasons for the recall and, if applicable, what the adverse effects on radiocommunications may be. If the equipment is a transmitter that may transmit radio emissions that could be harmful to the health or safety of individuals, the notice must set out the circumstances of the use of the equipment and the way that the health or safety of individuals is likely to be affected by the use (including misuse) of that equipment. The notice must also state whether a permanent ban on the equipment is in force.

Subsection 188(5) sets out that for each day that the contravention of a failure to notify ACMA under subsection 188(2) continues, the maximum civil penalty will be 10% of the maximum civil penalty that can be imposed in respect of a contravention under that subsection.

Item 25—Subsection 238(2)—Delegation

Section 238 of the Act confers delegation powers on ACMA including, under subsection 238(2), the power to delegate the power to make standards to another authority of the Commonwealth (e.g. a standards making body). With the repeal of the power to make standards (otherwise than as part of the equipment rules) in item 24, this reference to Part 4.1 of the Act is removed.

Item 26—Paragraph 262(2)(a)—Advisory Guidelines

Section 262 of the Act permits ACMA to make Advisory Guides including, under paragraph 262(2)(a), on any matter on which standards may be made under Part 4.1. This item amends this paragraph so that ACMA will be able to make Advisory Guides on any matter on which equipment rules may be made.

Item 27 and 28—Subsection 279(1)—Powers of Inspectors

Section 279 sets out the general powers of inspectors under the Act, with item 28 removing the power of inspectors in relation to record keeping requirements in place as part of compliance labelling notices made under section 302. Item 27 makes an editorial change, consequential to item 28.

Item 29—Paragraphs 285(p) to (s)—Decisions subject to internal reconsideration before AAT review

This item repeals the current decisions made under Part 4.1 that are subject to reconsideration and review under section 285. These decisions relate to the refusal to issue a permit, the conditions of a permit, the cancellation of a permit or the refusal of permission to supply a non-standard device. As these matters are within scope of permits able to be issued under the equipment rules, the repealed provisions are replaced by decisions under the equipment rules that may have a like effect, depending on the form of the equipment rules implemented by ACMA.

Item 30—Subsection 300(4) (penalty)

This item amends the penalty provision under section 300, which relates to the labelling of radiocommunications devices for the purposes of identification, so that the penalty is a civil penalty rather than a criminal penalty—consistent with the amendments to other penalty provisions made by Schedule 6.

Item 31—Transitional provisions related to former penalty provisions

This item inserts new sections 300A, 300B and 300C after section 300 of the Act, with these new sections containing transitional provisions relating to repealed provisions in sections 182, 279 and 301 of the Act.

Sections 300A, 300B and 300C provide civil penalty provisions (replacing the repealed criminal offence provisions), with each subject to a maximum penalty of 20 penalty units. Civil penalty provisions of the Act are enforceable under Part 4 of the Regulatory Powers (Standard Provisions) Act 2014.

Section 300A Transitional—failure to comply with requirements to be met after a label has been applied to a device

Section 300A retains the labelling obligations (including compliance with the requirements set out on the label) for labels that were applied under section 302 of the Act. This applies to labels applied prior to commencement of this section. Section 300A extends to general use, corporations, constitutional trade or constitutional commerce. This section provide civil penalty provisions on non-compliance with obligations outside of a reasonable excuse, with each subject to a maximum penalty of 20 penalty units.

This section stipulates that for all notices detailing requirements related to labels in force under section 302 of the Act prior to commencement, despite the repeal of section 182 of the Act, the notice, so far as it specified those requirements, continues in force, in relation to a label applied to a device before the commencement of this section, as if that section had not been repealed.

Section 300B Transitional—general powers of inspectors

Section 300B retains the power of inspectors to require production of certain records under repealed sections 182 and 301 of the Act. This includes documents recording particulars relating to supply of radiocommunications devices for the purposes of repealed section 301 of the Act.

Section 300C Transitional—retention of records of the supply of radiocommunications devices

Section 300C continues obligations under section 301 to retain records of supply of radiocommunications devices that arose under that section before its repeal. The person must retain the records for at least 2 years after the supply of that device.

Item 32—Section 301—Supply of radiocommunications devices to unlicensed persons.

Section 301 provides for matters that may now be incorporated by the equipment rules, and penalties for matters that are now within the scope of the penalty provisions in Part 4.1 as inserted by item 24 of this schedule. As such, it is appropriate to repeal this section.

Item 33—Subsection 305(5)

This item updates the definition of *radiocommunications instrument* for the purposes of this section, which deals with evidentiary certificates. The definition is updated to remove references to section 174, which is repealed by item 24 of this Schedule.

Item 34—Subparagraph 314(3)(b)(i)—Regulations

Section 314 provides a regulation making power for matters required or permitted by, or necessary or convenient to carry out or give effect to, this Act. This amendment makes clear that the regulation making power is not limited by the ability to make legislative rules and equipment rules under this Act, replacing previous references to the standards under Part 4.1.

Item 35—Subsection 314A(6)—Instruments under this Act may provide for matters by reference to other instruments

Section 314A permits instruments under the Act to refer to other instruments and other relevant writings and incorporate their provisions as in force at a particular time, or as in force from time to time. This item extends the definition of an instrument under this Act to the equipment rules and legislative rules, consistent with the treatment of all instruments under the Act under the current section 314A(6). This power has been essential for the performance of functions such as the making of standards, which will now be performed under the equipment rules.

Part 2—Amendments Contingent on the commencement of the Federal Circuit and Family Court of Australia Act 2020

Radiocommunications Act 1992

Item 36—Subsections 170(1), 176(1) and 187(1)

These subsections confer jurisdiction on the Federal Circuit Court of Australia which, at the time of the commencement of the Federal Circuit and Family Court of Australia Act 2020, will be replaced by the Federal Circuit and Family Court. This item amends the references in these subsections accordingly.

Part 3—Other amendments

Australian Communications and Media Authority Act 2005

Item 37—Subsection 66(5)—Person not to use protected name or protected symbol

Section 66 of the ACMA Act provides an offence for persons who use a protected symbol or name without ACMA's consent. Subsection (5) creates an exception to this offence for persons who use a protected name or symbol for labelling in accordance with section 182 of the Radiocommunications Act 1992. This item would update that subsection of ACMA Act to instead refer to labelling done in accordance with the equipment rules.

Telecommunications Act 1997

Items 38 and 39—Protected symbols

These items update references to protected symbols under the Radiocommunications Act 1992, so that they refer to the requirements of the equipment rules, rather than the requirements of labelling notices issued under section 182, consequential to the amendments made by item 24.

Trans-Tasman Mutual Recognition Act 1997

Items 40 and 41—Clause 3 of Schedule 2—Radiocommunications devices

This item updates the radiocommunications laws that are exempt from the operation of the Trans-Tasman Mutual Recognition Act, so that the table item refers both to the Act and to the rules made under the Act (other than in relation to labelling).

Part 4—Application and Transitional Provisions

Item 42—Transitional—Standards

This section provides transitional arrangements for standards issued by ACMA under section 162 of the Act in place before commencement. Under these arrangements, these standards are deemed to operate as equipment rules.

This item replaces the language of instruments and their associated explanatory notes with terms in line with the reforms of this Act, so that they are able to operate as equipment rules, rather than as standards.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the instrument had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 43—Transitional—Radiocommunications (compliance labelling—devices) Notice 2014

This item provides transitional arrangements for the labelling requirements set out in the Radiocommunications (Compliance Labelling—Devices) Notice 2014 for instruments in force before commencement of this part. Under these arrangements, this notice is deemed to be part of the equipment rules at the commencement time.

This item replaces the language of the notice and their associated explanatory notes with terms in line with the reforms of this Act.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the instrument had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 44—Transitional—Radiocommunications Labelling (Electromagnetic Compatibility) Notice 2017

This item provides transitional arrangements for the labelling requirements set out in the Radiocommunication Labelling (Electromagnetic Compatibility) Notice 2017 for the Notice in force before commencement of this part. Under these arrangements, this notice is deemed to be part of the equipment rules at the commencement time.

This item replaces the language of the Notice and their associated explanatory notes with terms in line with the reforms of this Act.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the notice had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 45—Transitional—Radiocommunications (Compliance Labelling—Electromagnetic Radiation) Notice 2014

This item provides transitional arrangements for instruments under the Radiocommunication (Compliance Labelling—Electromagnetic Radiation) Notice 2014 in force before commencement of this part. Under these arrangements, this notice is deemed to be part of the equipment rules at the commencement time.

This item replaces the language of the notices and associated explanatory notes with terms in line with the reforms of this Act.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the instrument had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 46—Transitional—Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015

This item provides transitional arrangements for the Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015 in force before commencement of this part.

This item provides transitional arrangements for the Telecommunications (labelling notice for customer equipment and customer cabling) Instrument 2015 in force before commencement of this part.

This item replaces the language of the notice and associated explanatory notes with terms in line with the reforms of this Act.

Item 47—Transitional—Permits

This item provides transitional arrangements for permits in force before commencement of this part, provided they were made under section 167(2) of the Act before it was repealed by Item 24 of this Schedule to the Bill.

This item replaces the language of permits with terms in line with the reforms of this Act. Under these arrangements, these permits continue to operate under the equipment rules until they expire.

Item 48—Transitional—Protected Symbols Determination 2013

This item provides transitional arrangements for the Protected Symbols Determination 2013 in force before commencement of this part, provided it was made under section 188A of the Act and section 417 of the Telecommunications Act 1997.

This item replaces the language of the determination and their associated explanatory notes with terms in line with the reforms of this Act.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the instrument had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 49—Transitional—permanent bans

This item applies to instruments in force prior to commencement of this part made under subsection 190(1) of the Act related to the operation or supply, or possession of the purpose of operation or supply, of a prohibited device. These instruments have effect as if they were a permanent ban under section 171(1) of the Act, as amended by this Schedule.

This item provides that Section 50 of the Legislation Act 2003 has effect as if the instrument had been registered (within the meaning of that Act) immediately after the commencement of this item.

Item 50—Transitional and application—protected names and protected symbols

This item provides that certain provisions related to protected names and protected symbols continue to apply in relation to things done under parts of the Act that are proposed to be amended by this Schedule to the Bill. These provisions include:

- Subsection 417(6) of the Telecommunications Act 1997
- Subsection 66(5) of the Australian Communications and Media Authority Act 2005
- Subsections 164(1), 164(3) and 164(5) of the Act

Item 51—Transitional—recall of equipment

This item provides that for the purposes of subsection 183(1), 183(2), 183(3) or 183(4) of the Act, as proposed to be amended by this Schedule to the Bill, it is immaterial whether the supply of equipment occurred before, at or after the commencement of this item.

Item 52—Application—section 305 of the Radiocommunications Act 1992

This item provides that the amendment of section 305 of the Act made by this Schedule applies in relation to a certificate issued under that section after the commencement of this item.

SCHEDULE 5—ACCREDITATION ETC.

The amendments contained in Schedule 5 of the Bill expand ACMA's accreditation powers. Under these powers ACMA may develop accreditation rules, determine the conditions of accreditation, processes and necessary qualifications to be applied in the granting of different categories of accreditation. Under the Act ACMA is currently limited in the functions it can devolve to industry. These amendments provide greater flexibility and will allow innovative management arrangements to develop, and potentially result in greater efficiency of spectrum use.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Section 5

Item 1 amends section 5 of the Act to insert relevant definitions for accreditation and accreditation rules, as given under section 263 and 266 respectively.

Item 2—Section 5 (definition of conciliator)

Item 2 amends section 5 of the Act to repeal the definition of conciliator and substitutes it with the new meaning given by section 202, introduced by item 14.

Item 4—Section 71—Other conditions of spectrum licences

Section 71 enables ACMA to include other condition in a spectrum licence as it thinks fit. This item inserts subsections (3) and (4), which clarify that such conditions may also confer administrative decision making powers on ACMA and accredited persons, and subsection (5), which authorises an accredited person to charge fees in relation to the exercise of this power. Such a fee must not amount to taxation.

Item 4A—Section 73A—Conditions included in a spectrum licence

This item inserts a new section, outlining provisions for decision-making powers related to spectrum licences. Subsections 73A(1) and 73A(2) clarify that conditions included in a

spectrum licence under Subsections 72(1) or 73(1) may confer a power to make a decision of an administrative character on ACMA, or on a person who holds a specified kind of accreditation.

Subsection 73A(3) adds that a person who holds a specified kind of accreditation may be authorised by the legislative rules to charge a fee in relation to this, as long as it does not amount to taxation.

Items 5 and 6—Subsection 100(4A)—Issuing of apparatus licences

Section 100 sets out the circumstances in which ACMA may issue an apparatus licence. Subsection (4A) provides that ACMA may have regard to a frequency assignment certificate issued by an accredited person. Item 5 updates the reference to accredited person, to be clear that they are someone who holds an accreditation of a kind specified in the rules. Item 6 makes clear that such a person may charge fees for their services, so long as the fee does not amount to taxation.

Item 7—Paragraph 107(1)(f)—General conditions of apparatus licence

Paragraph 107(1)(f) enables ACMA to determine conditions of an apparatus licence by legislative instrument. This item repeals this paragraph, due to the broader power being introduced by item 10.

Item 8—Subsection 107(2)—General conditions of apparatus licence

This item repeals the reference to paragraph 107(1)(f) from this section, due to the this power being repealed by item 7.

Item 9—Paragraph 108A(1)(e)—Conditions of transmitter licences for temporary community broadcasters

Paragraph 108A(1)(e) enables ACMA to determine conditions of a transmitter licence for temporary community broadcasters by legislative instrument. This item repeals this paragraph, due to the broader power being introduced by item 10, meaning ACMA will be able to determine these kinds of conditions under section 110A going forward.

Item 10—Section 110A—conditions determined by ACMA

Item 10 inserts section 110A into the Act to provide that ACMA may, by legislative instrument, include one or more conditions in the determination of an apparatus licence or a specified class of apparatus licences. These conditions may incorporate specific requirements for licence holders and they may confer a decision making power on ACMA or a person who holds a specific kind of accreditation under section 263. For example, certain changes in specified circumstances may require approval before they are authorised by the licence. Subsections 110A(6) and (7) give effect to the expanded accreditation regime as they enable persons with an accreditation to perform functions that form part of the conditions of spectrum licences and charge fees for doing so.

This broader decision making power will apply to transmitter licences issued under section 101A or 102 and digital radio multiplex transmitter licences, unlike the repealed paragraph 107(1)(f). The transitional provisions provide that a determination made under paragraph

107(1)(f) immediately before the commencement of Schedule 5 does not apply to these types of apparatus licence. This avoids a situation where a prior determination made by ACMA would unintendedly expand to cover all apparatus licence types.

Item 11—Section 111A—Licence conditions may confer powers on ACMA or a person who holds an accreditation

Item 11 inserts section 11A into the Act. Under the Act, ACMA has a broad range of powers to specify conditions to which an apparatus licence is subject, as set out in subsection (1). Section 111A clarifies that the power to specify these conditions and includes the power to confer administrative decision making powers on ACMA or an accredited person. This is similar to the general power to determine conditions by legislative instrument in subsection 110A (7). Subsection 111(4) enables an accredited person to charge fees for the exercise of powers conferred by a condition.

Items 12 and 13—Section 145—Refusal to register radiocommunications transmitters operation under spectrum licences

Item 12 amends subsection 145(3) to omit the current reference to a person accredited under section 263 and substitutes it with language acknowledging the new accreditation regime. This amendment gives effect to the changes in accreditation established by the legislative rules as in section 266. Item 13 makes clear that such a person may charge fees for their services, so long as the fee does not amount to taxation.

Item 14—Section 202—Conciliator

Item 14 repeals sections 202 to 204 removing previous provisions relating to the appointment of a conciliator, terms and conditions, and remuneration and allowances. This item inserts a new simplified section 202 outlining that a conciliator means a person who holds accreditation under the legislative rules under section 266. The repealed sections 203 and 204 are now covered under other amendments made by Item 15.

Item 15—Sections 263 ACMA may accredit persons, 264 Conditions of accreditation, & 264A Withdrawal of accreditation

Item 15 repeals the existing sections 263 and 264 of the Act and inserts new provisions, so that ACMA may give persons accreditation of a particular kind, in accordance with accreditation rules. Subsection 263(1) provides accreditation must be given by written notice which provides ACMA with the option to accredit a person without an application being made. Subsection 263(2) gives effect to the accreditation rules outlined in section 266, providing that accreditation must be given in accordance with these accreditation rules. Subsection 263(3) provides that an accreditation takes effect on the day specified in the instrument.

Section 264 provides that ACMA may specify further conditions on accreditation in both the accreditation rules and in an instrument of accreditation.

Subsection 264A(2) enables ACMA to, by written notice, withdraw accreditation if it is satisfied that the accreditation is no longer in accordance with the accreditation rules as in force at the time the notice is given, or the person has contravened a condition of the accreditation. Subsection 264A(3) requires that the written notice must provide the reasons

for withdrawing accreditation. Subsection 264A(4) specifies that ACMA must comply with the accreditation rules made under section 266 when deciding to withdraw an accreditation.

Item 16—Section 266—Accreditation rules

Item 16 repeals the current section 266 of the Act and makes new provisions which enable ACMA to make accreditation rules to specify accreditation process, procedures for accrediting persons or withdrawing the accreditation of a person. Subsection 266(1) provides flexibility to broaden the scope of the existing accreditation powers to allow accredited persons to undertake other spectrum management functions as specified under the principles set out by ACMA. Subsections 266(2), (3) & (4) provide that the accreditation rules may deal with accreditation processes and procedures for accrediting persons and deciding whether to withdraw an accreditation. Subsection 266(5) provides that the accreditation rules may make provision for the kinds of accreditation, and the qualifications and other requirements for a person to be given that kind of accreditation. Subsection 266(6) provides that the accreditation rules may make provision in relation to a matter by conferring a power on ACMA (e.g. the power to approve a form).

Items 17 & 18 & 19—After paragraph 285(v), Paragraph 285(w) & After paragraph 285(w)

Item 17 inserts subsection 285(va) which provides that ACMA can subject a decision under paragraph 264(b) to specify a condition in an instrument of accreditation to internal reconsideration before AAT review.

Item 18 omits ‘264’ within subsection 285(w) and substitutes it with ‘264A’, as a consequence of the amendments in item 15.

Item 19 inserts a new paragraph 285(waa) to include in section 285 decisions of ACMA which are made under the accreditation rules and declared by the accreditation rules to be subject to section 285. This allows these sorts of decisions to be subject to internal consideration before AAT review.

Item 20—Section 298A—Fees imposed by bodies or organisations

Item 20 repeals section 298A and substitutes it with a new section 298A. The new subsection 298A(1) provides that ACMA may, by notifiable instrument, determine that a specified body or organisation approved by ACMA as under paragraph (b) of subsection 122(2) may charge fees for performing their accredited action, but omits the references to subsections 183(1) and 183A(1) as the current subsections are replaced by item 24 of Schedule 4. The new subsection 298A(2) stipulates that the fee must not amount to taxation.

Item 21—Paragraph 308(b)

Item 21 omits ‘264’ within the paragraph 308(b) and substitutes it with ‘264A’, effectively correcting numbering of this subclause.

Part 2—Application and transitional provisions

Item 22—Definitions

This item defines the transitional accreditation rules as the rules that are made under item 29.

Item 23—Applications—Frequency assignment certificates

This item provides that the amendments made to section 100 by this Schedule apply to certificates issued after the commencement of the item. This means that if a certificate has been issued prior to the commencement time, it can be considered by ACMA in making a decision to issue an apparatus licence under section 100, or another related decision.

Items 24 and 25—Transitional—Conditions of apparatus licences & Conditions of transmitter licences for temporary community broadcasters

This Item repeals powers to determine the conditions of apparatus licences, and replaces them with a general power under section 110A. These items saves any conditions made by determinations under paragraphs 107(1)(f) and 108(1)(e) as if they were determinations made under subsection 110A(2).

Item 26—Transitional—Accreditation

This item transitions any existing accreditations in place under subsection 263(1) of the Act as it existed prior to the commencement of this Schedule. Any such accreditations have effect after the commencement as if they were an accreditation of the same kind given under subsection 263(1) as it exists after the commencement of this Schedule.

Item 27—Transitional—Fees determination

If a determination was in place under subsection 298A(1) of the Act prior to the commencement authorising the collection of fees by a specified body or organisation approved by ACMA to conduct an approved examination, then the determination will continue to have effect under the amended subsection 298A(1) and will continue to apply to functions performed prior to commencement. This will enable these bodies or organisations to charge fees for work completed prior to the commencement of this Schedule.

Item 28—No compensation for withdrawal of accreditation

This item provides that any person who has their accreditation withdrawn, despite the amendment of section 308, is not entitled to compensation.

Item 29—Transitional—Accreditation rules

This item enables ACMA to make transitional accreditation rules on matters required or permitted to be prescribed by the rules under this Part. These rules are designed to facilitate transition between the existing accreditation system and the provisions contained in this Schedule. The only application of transitional accreditation rules in this part is in

regards to paragraph 22(1)(c). As a legislative instrument, the requirements of the Legislation Act will apply to the making of the transitional rules.

SCHEDULE 6—COMPLIANCE AND ENFORCEMENT

This Schedule provides for ACMA to have a modern and more agile range of tools and powers for compliance and enforcement and related matters, giving effect to recommendation 1(g) of the Spectrum Review.

Part 1—Amendment of the Radiocommunications Act 1992

Items 1, 2 and 3—Section 5—Definitions

These items insert a range of definitions that are used elsewhere in this section. Further detail on these items is provided in the provisions relevant to the definition.

A “designated forfeiture officer” is defined in section 283 as the Chair of ACMA and a member of the staff of ACMA authorised, in writing, by ACMA.

A “forfeiture notice” is defined as a notice issued under section 274.

An “inspector” is defined as a person described in section 284.

The “Regulatory Powers Act” is defined as the Regulatory Powers (Standard Provisions) Act 2014.

A “transmitter access warrant” is defined as a warrant issued under section 284KB.

Item 4—Subsection 11(1)—References to offences against this Act

Section 11 extends the definition of an offence against this Act with reference to particular offences in the Crimes Act 1914 and the Criminal Code. This item revises the language used to refer to the Crimes Act 1914 and the Criminal Code to be consistent with the amendments made by other items of this Schedule.

Item 5—Subsection 11(1A)—References to offences against this Act

This item repeals subsection 11(1A) of the Act as a consequence of the change in subsection 11(1).

Item 6—Paragraph 11(2)(b)—References to offences against this Act

This item repeals paragraph 11(2)(b) of the Act as a consequence of the introduction of infringement notices.

Item 7—Division 1 of Part 3.1 (at the end of the heading)

The heading of Division 1 of Part 3.1 is amended to read “Division 1—offences and civil penalties” in line with the introduction of a graduated range of compliance and enforcement options to address non-compliance with the Act.

Item 8—Subsection 46(1)—Unlicensed operation of radiocommunications devices

Subsection 46(1) makes it an offence for a person to operate a radiocommunications device otherwise than authorised by a spectrum licence, an apparatus licence or a class licence unless section 49 of the Act applies. The subheading ‘Offence’ has been inserted immediately above the subsection to distinguish the offence from the following subsections that describe the same conduct by a person as being a contravention of the Act and sets out the civil penalties that apply.

Item 9—Subsections 46(3) and (4)—Unlicensed operation of radiocommunications devices

Subsections 46(3) and (4) set out the civil penalty for contravening the Act by operating a radiocommunications device otherwise than authorised by a spectrum licence, an apparatus licence or a class licence unless section 49 of the Act applies. Subsection 46(3) establishes a penalty of 300 penalty units for the operation of a radiocommunications transmitter and 20 penalty units for the operation of a radiocommunications device that is not a radiocommunications transmitter. Subsection 46(4) provides that the penalty does not apply if the person has a reasonable excuse. The note to subsection 46(4) states that a defendant bears an evidential burden in relation to the matters in the subsection and includes a reference to section 96 of the Regulatory Powers (Standard Provisions) Act 2014 (the Regulatory Powers Act).

Item 10—Subsection 47(1)—Unlawful possession of radiocommunications devices

Subsection 47(1) makes it an offence for a person to possess a radiocommunications device for the purpose of operating it unless authorised by a spectrum licence, an apparatus licence or a class licence unless section 49 applies. The subheading ‘Offence’ has been inserted immediately above the subsection to distinguish the offence from the following subsections that describe the same conduct by a person as being a contravention of the Act and sets out the civil penalties that apply.

Item 11—Subsections 47(3) and (4)—Unlawful possession of radiocommunications devices

Subsections 47(3) and (4) set out the civil penalty for contravening the Act by possessing a radiocommunications device for the purpose of operating it otherwise than authorised by a spectrum licence, an apparatus licence or a class licence unless section 49 of the Act applies. Subsection 47(3) establishes a penalty of 300 penalty units for the possession of a radiocommunications transmitter for the purpose of unlicensed operation and 20 penalty units for the possession of a radiocommunications device that is not a radiocommunications transmitter for the purpose of unlicensed operation. Subsection 47(4) provides that the penalty does not apply if the person has a reasonable excuse. The note to the subsection states that a defendant bears an evidential burden in relation to the matters in the subsection and includes a reference to section 96 of the Regulatory Powers Act which provides for defendants to bear an evidential burden for such matters.

Item 12—Subsection 49(2)—Emergency operation of a radiocommunications device

Section 49 provides defences to the provisions of section 46 and 47 where the operation or possession of a device was necessary in specified emergency situations. The references to

sections 46 and 47 in subsection 49(2) have been updated to refer to subsection 46(1) and subsection 47(1) as a result of section renumbering.

Item 13—Subsection 49(2A)—Emergency operation of a radiocommunications device

Consequential to the addition of civil penalty provisions to sections 46 and 47, this item inserts subsection 49(2A) to place an evidential burden on a defendant to prove the matters set out in subsection 49(1) existed in order for the civil penalties in either or both subsection 46(3) and subsection 47(3) not to apply.

Item 14—Section 113—Contravention of conditions

Section 113 creates penalties for contravening the conditions of an apparatus licence. Consistent with taking a graduated approach to compliance, this item replaces the offence of contravening a condition of a licence with a civil penalty that applies in the same context as the offence. A person does not contravene the section if they have a reasonable excuse. The defendant in proceedings for a civil penalty order bears an evidential burden to establish the matters necessary to rely on the exemption from the contravention provision. The amount of penalty units for the civil penalty, 100 penalty units, is the same as that which applied to the offence.

Item 15—Subsection 116(3)—Revocation of authorisations

Subsection 116(3) is amended to make the failure of a licensee to comply with a notice from ACMA to revoke an authorisation within 7 days subject to a civil penalty of 30 penalty units. Making the conduct a contravention of the Act subject to a civil penalty is intended to help ensure the effective enforcement of the regulatory regime.

Item 16—Subsection 116(4)—Revocation of authorisations

Subsection 116(4) is amended to make it a contravention of the Act for a licensee served with a notice under subsection 116(3) to issue a further authorisation to a person named in the notice, subject to a civil penalty of 30 penalty units. Making this conduct a contravention of the Act subject to a civil penalty is intended to help ensure the effective enforcement of the regulatory regime.

Items 17—9—Subsection 117(1)—Licensees must keep records of authorisations

This section requires an apparatus licensee who authorises a person to operate a radiocommunications device under section 114 of the Act to keep a record of the authorisation. The section imposed a penalty for non-compliance, which is repealed and substituted with a civil penalty of the same amount, 20 penalty units, by Item 18 of this Schedule. As a consequence of removing the offence, subsection 117(2) is repealed by Item 19 of this Schedule, requiring an editorial change to renumber the remaining subsection 117(1) as section 117.

The criminal penalty in the subsection is repealed and substituted by a civil penalty of the same amount, that is, 20 penalty units.

Subsection 117(2) and the accompanying note are repealed as a consequence of the amendment to subsection 117(1).

Item 20—Subsection 118(1) (penalty)—Licensees must notify authorised persons of certain matters

Subsection 118(1) places an obligation on a licensee to inform authorised persons of certain changes, for example, a change in licence conditions, receipt of a notice requiring revocation of an authorisation or suspension of a licence. The criminal penalty attached to the obligation is repealed and substituted by a civil penalty of the same amount, that is, 20 penalty units.

Item 21—Subsection 118(1A)—Licensees must notify authorised persons of certain matters

Subsection 118(1A) which made the contravention of subsection 118(1) an offence of strict liability has been repealed as a consequence of the criminal penalty in that subsection being repealed.

Item 22—Subsection 124(4)—Cancelling certificates of proficiency

Subsection 124(4) relates to the cancellation of an operator's certificate of proficiency by ACMA. The amendment changes the requirement that an operator return a certificate within 7 days to a requirement that the operator not falsely represent that they have a certificate. This amendment recognises that in modern times it is of less consequence that a person fail to return a physical certificate and of greater consequence that the person not falsely represent in the public domain that they have a current certificate.

Item 23—Subsection 124(4) (penalty)—Cancelling certificates of proficiency

The criminal penalty attached to the requirement in subsection 124(4), as amended by Item 22A of this Schedule, is repealed and substituted by a civil penalty of the same amount, that is, 20 penalty units. This is intended to aid in the effective enforcement of the regulatory regime.

Item 24—Subsections 124(5) and (6)—Cancelling certificates of proficiency

Subsection 124(5) provided an exception to the contravention set out in subsection 124(4). Subsection 124(6) made the contravention an offence of strict liability. The subsections have been repealed as a consequence of the repeal of the criminal penalty in subsection 124(4).

Item 25—Subsection 195(1) (penalty)—Transmission from foreign vessel, aircraft or space object

Under section 195 of the Act, it is an offence to use a transmitter from a foreign vessel, aircraft or space object in specified circumstances. The criminal penalty for committing the offence was 2 years imprisonment or 1,500 penalty units. These penalties are not consistent with penalties imposed for similar offences and elsewhere in the Act. The penalties have been repealed and substituted by a civil penalty of 300 penalty units.

Item 26—Subsection 196(2)—Emergency transmission etc.

Subsection 196(1) provides for an exception on specified grounds to the possible contravention of sections 193 and 194 and, previously, section 195 relating to the misuse

of a transmitter. Subsection 196(2) provides that a defendant bears the evidential burden of proving the matters in subsection 196(1). The reference to subsection 195 in subsection 196(2) has been omitted as a consequence of the criminal penalty in section 195 being repealed and substituted by a civil penalty.

Item 27—Subsection 196(3)—Emergency transmission etc.

Subsection 196(3) provides that in proceedings for a civil penalty order for a contravention of subsection 195(1), the burden of proving the matters referred to in subsection 196(1) lies on the defendant. This subsection reflects the change in the type of penalty applied in subsection 195(1) from criminal to civil in nature.

Item 28—Section 197—Causing interference etc.

This item repeals the offence in section 197 of causing interference with radiocommunications and substitutes it with a civil contravention in similar terms with a civil penalty equal to the criminal penalty that had been imposed.

Item 29—Subsection 231(6)—Outline of Chapter 5

Section 231 provides an outline of Chapter 5—Administration and Enforcement. This Item amends subsection 231(6) to reflect that Part 5.5, as repealed and substituted by Item 32 of this Schedule, now deals with matters relating to the enforcement of the Act.

Item 30—Subsection 231(9)—Outline of Chapter 5

Subsection 231(9) repeals the provisions on enforceable undertakings given about compliance with this Act and triggers the operation of the enforceable undertaking provisions in the Regulatory Powers Act.

Item 31—Part 5.5—Enforcement

Part 5.5 of the Act is replaced by this item.

Part 5.5 as amended triggers each of the following frameworks established by the Regulatory Powers Act, meaning ACMA will be able to choose from a range of formal actions as appropriate in each circumstance:

- monitoring compliance with civil penalty and certain offence provisions, or information given in compliance with a provision of Division 5 of Part 5.5 of the Act, under Part 2 of the Regulatory Powers Act;
- investigating offence or civil penalty provisions, under Part 3 of the Regulatory Powers Act;
- enforcing civil penalty provisions under Part 4 of the Regulatory Powers Act;
- issuing an infringement notice under Part 5 of the Regulatory Powers Act;
- accepting an enforceable undertaking under Part 6 of the Regulatory Powers Act; and
- seeking an injunction, which may be granted under Part 7 of the Regulatory Powers Act.

Part 5.5 also provides some enforcement arrangements that are specific to the Act (that is, provisions that are not part of the Regulatory Powers Act framework), such as the ability

for ACMA to issue a public warning notice or apply to the court for forfeiture orders for things used in the contravention of an offence or civil penalty provision. Inspectors also have additional powers conferred directly under the Act including the power to direct a person to operate a transmitter (section 284F), the power to enter unoccupied premises and adjust transmitters in emergencies (section 284EB). ACMA has the power to give a remedial direction to a person (section 268).

The tools included in Part 5.5 are designed to allow ACMA to implement a graduated response to enforcement, with greater reliance on civil rather than criminal penalties. This is intended to enable a more targeted and proportionate enforcement response, and better align ACMA's enforcement capabilities with those of other Australian regulators.

The appropriateness of each enforcement power was assessed having regard to the Attorney-General Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The coercive powers that inspectors will have under the Act are less than those provided under the Act prior to these amendments, for example, the Act does not include emergency search and seizure powers that were previously available, exercisable without warrant or consent.

The text of the substantive provisions from the Regulatory Powers Act are not included in the body of the Act. Therefore, users of the legislation must read the Bill in conjunction with the Regulatory Powers Act for full details on the enforcement regime. The Regulatory Powers Act can be accessed on the Federal Register of Legislation at www.legislation.gov.au/Series/C2014A00093.

Division 1—Introduction

Section 267—Simplified outline of Part 5.5

Section 267 provides a simplified outline of Part 5.5 of the Act.

Division 2—Enforcement

Section 268—Remedial directions—breach of civil penalty provision

This Section enables ACMA to give a remedial direction to a person who has contravened or is contravening a civil penalty provision of the Act. A remedial direction is a written notice given to a person, requiring them to take a specified action, in order to prevent or make it unlikely that future contraventions of the Act will occur.

Remedial directions are designed to be used as part of the graduated enforcement approach to compliance. The section is designed to give broad scope to ACMA to tailor the direction to fit the given circumstances. It may be the case that a remedial direction is used in conjunction with or supplemental to other enforcement action. Using a remedial direction ideally avoids the need for court action to be taken, lessening the burden on the court system and reducing costs to government.

Subsection 268(3) provides two examples of the kinds of directions that may be given to a person by ACMA. These examples are non-exhaustive and should not be seen as limiting the kinds of directions that ACMA may wish to give.

ACMA currently issues remedial directions under a number of Acts such as the *Telecommunications Act 1997* and the *Broadcasting Services Act 1992*. The tool is often the timeliest and most effective remedy available to ACMA.

The decision to give a remedial direction is reviewable under Part 5.6.

Compliance with a remedial direction is required by a civil penalty provision that is subject to a maximum penalty of 50 penalty units.

Section 269—Civil penalty provisions—enforcement

This section triggers Part 4 of the Regulatory Powers Act. This applies the civil penalty provision framework from the Regulatory Powers Act to the Act. The civil penalty provisions that are relevant for this section are generally those that set out a pecuniary penalty at its foot, indicated by the words “Civil penalty” (see subsection 79(2) of the Regulatory Powers Act). Such provisions may be enforced by ACMA under Part 4 of the Regulatory Powers Act.

For the purposes of the Act, ACMA is the only authorised applicant empowered to exercise the powers under Part 4 of the Regulatory Powers Act and the relevant courts are the Federal Court and the Federal Circuit Court.

The Regulatory Powers Act civil penalty framework has been included in the Act as part of a graduated enforcement regime. Amongst a number of policy reasons, the inclusion of civil penalties will reduce the regulator’s reliance on criminal sanctions. The provisions will allow ACMA to take enforcement action that is commensurate with the seriousness of a person’s breach of the Act.

Under subsection 269(6) a person is not liable under Part 4 of the Regulatory Powers Act if the contravening conduct is carried out in response to circumstance of sudden or extraordinary emergency. Details of the defence are set out in the subsection. A defendant has an evidential burden of proving the matters necessary to rely on the defence.

Section 270—Infringement notices

Section 270 triggers Part 5 of the Regulatory Powers Act thereby applying the infringement notices framework from the Regulatory Powers Act to the Act. This empowers an “infringement officer” to issue an infringement notice when the officer reasonably believes that a person has contravened a provision of the Act that is listed under subsection 270(1). For the purposes of the Act, a member of the staff of ACMA who has been authorised in writing, by ACMA, is an infringement officer. The Chair of ACMA is also an infringement officer.

Infringement notices are designed to be used as part of the graduated approach to compliance and enforcement. Infringement notices provide an alternative to prosecution for an offence or an application to a court for a civil penalty order.

Section 270 does not affect any civil liability under section 50 of the Act or otherwise under law.

Section 271—Enforceable undertakings

This section triggers Part 6 of the Regulatory Powers Act. This applies the enforceable undertakings framework from the Regulatory Powers Act to the provisions of the Act. The framework legislation in the Regulatory Powers Act requires an enabling Act to detail necessary features of the process, such as who is an “authorised person” empowered to exercise powers under Part 6 and in which “relevant court” the undertakings can be

enforced. For the purposes of the Act, ACMA is the only authorised person and the relevant courts are the Federal Court and the Federal Circuit Court.

Enforceable undertakings are designed to be used as part of the graduated enforcement approach to compliance. ACMA was able to accept enforceable undertakings under the previous Part 5.8 of the Act. The new framework will operate in a similar fashion, providing ACMA with a general power to accept enforceable undertakings in relation to provisions in the Act.

Enforceable undertakings can play a preventative role by shaping behaviours in order to prevent a contravention occurring. Undertakings can also ensure that compliance oversight is ongoing, which is particularly useful in the radiocommunications space, given the ease with which someone might inadvertently interfere with radiocommunications.

The Act modifies the operation of the Regulatory Powers Act, requiring ACMA to publish, on its website, an undertaking that has been given in relation to a provision of the Act. The legislative rules may also provide additional requirements for ACMA to publish an enforceable undertaking. Requiring publication of the undertakings that have been accepted by ACMA will allow public scrutiny of undertakings and increase transparency of the enforcement system. The publishing of undertakings also has an educative effect in regards to future compliance by allowing industry and spectrum users to note where compliance issues have arisen.

Section 272—Injunctions

Section 272 triggers Part 7 of the Regulatory Powers Act. This applies the injunctions framework from the Regulatory Powers Act to the provisions listed in subsection 272(1). For the purposes of the Bill, ACMA is the only authorised person empowered to exercise the powers in Part 7 and the relevant courts are the Federal Court and the Federal Circuit Court.

Injunctions are designed to be used as part of the graduated enforcement approach to compliance. An injunction may be most appropriately used where compliance measures that do not involve the court have already been applied and have not been successful in reducing the risk of a future contravention to a satisfactory level, or where ACMA assesses it to be the most efficient and effective initial regulatory response due to the seriousness and nature of the breach.

Division 3—Forfeiture notices

Section 273—Provisions subject to a forfeiture notice

The forfeiture notice scheme is intended to operate in a similar way to the infringement notice scheme in the Act (as set out in Part 5 of the Regulatory Powers Act), enabling a designated forfeiture officer to issue a notice when the officer believes on reasonable grounds that the person has contravened a particular provision of the Act listed in section 273. However, instead of choosing to pay a financial penalty in response to the notice (as would be the case for an infringement notice), a person may voluntarily forfeit a thing that has been alleged to have been used or involved in contravention of one of the provisions listed in subsection 273(1) of the Act. When a person complies with the notice, they are not admitting guilt for the contravention but will also not be liable to any further prosecution or civil penalty action in relation to offences involving the forfeited item mentioned in the forfeiture notice.

Section 274—When a forfeiture notice may be given

A forfeiture notice may be given in relation to a thing if a designated forfeiture officer believes on reasonable grounds that a person has contravened one of the provisions listed in section 273, and that the thing was used, or otherwise involved, in the contravention of the provision. A ‘thing’ in this context is intended to be broadly construed. A notice may include one or more contraventions of the same or different provisions and must be issued within 12 months of the day in which the contravention took place.

Section 275—Matters to be included in a forfeiture notice

A forfeiture notice must contain the information set out in section 275. These include a unique number, the names of the designated forfeiture officer and the person receiving the notice, details of the contravention including the statutory penalties and statements regarding the effect of agreeing or not agreeing to forfeit the thing to which the notice relates.

Section 276—Extension of time to agree to forfeit a thing to the Commonwealth

A person who receives a forfeiture notice may ask ACMA to extend the period of time for agreeing to forfeit a thing mentioned in a notice. The person must seek the extension within the expiry period of the notice (28 days). ACMA may extend the period of the notice one or more times subject to receiving a request to do so. If ACMA receives such a request but refuses it, the expiry period ends at the end of the original 28 days, or else 7 days after notice of the refusal is given to the person, whichever is the later

Section 277—Withdrawal of a forfeiture notice

A person who receives a forfeiture notice may ask ACMA in writing that it withdraw the notice. After considering the matters set out in subsection 277(4), ACMA may withdraw a notice whether or not the person to whom it was issued has asked that it be withdrawn, unless the thing mentioned in the notice has already been forfeited to the Commonwealth in accordance with the Act.

Section 278—Effect of agreeing to forfeit a thing to the Commonwealth

A person who receives a forfeiture notice that has not been withdrawn may agree to forfeit the thing mentioned in the notice. By forfeiting the thing, any liability of the person for the alleged contravention or contraventions set out in the forfeiture notice is discharged, proceedings for a civil penalty in relation to the contravention(s) cannot be brought, and the person cannot be prosecuted for a criminal matter that is based on the conduct that is the same or substantially the same as the alleged conduct for which the forfeiture notice was originally given. Further, a person who has agreed to forfeit a thing is not regarded as having admitted guilt or liability for the alleged contravention(s) to which the forfeiture notice and the thing relate. However, even where a person has been issued a forfeiture notice and complied with that notice, this does not affect the ability of a private third party to bring civil proceedings against the person under section 50 of the Act or otherwise under law.

Section 279—ACMA may take possession of a thing

The section sets out the steps for ACMA to take possession and return possession of a thing mentioned in a forfeiture notice given to a person, where the owner has agreed to forfeit that thing to the Commonwealth. Sections 47 and @160 and subsections @174(4) and @175(4) do not apply to the owner’s possession of the thing until either ACMA takes

possession of the thing or the notice is withdrawn. If ACMA was not entitled to take possession of the thing it must take all reasonable steps to return it to the owner.

Section 280—Forfeiture of a thing to the Commonwealth

ACMA may declare in writing that a thing it has taken possession of under section 279 is forfeited to the Commonwealth once at least 90 days have passed since ACMA gave the owner a receipt for taking possession of the thing.

A thing is deemed to be forfeited to the Commonwealth if a forfeiture notice regarding the thing has been given to a person, the owner has agreed to forfeit the thing and 120 days have passed since the owner was given a receipt following ACMA taking possession of the thing.

Section 281—Forfeited things may be sold, destroyed or otherwise disposed of

A thing forfeited under section 280 must be kept in custody as directed by ACMA until it is sold, destroyed or otherwise disposed of in accordance with directions of ACMA.

Section 282—Effect of this Division

This section clarifies that the power to issue forfeiture notices does not, by implication, limit the discretion of ACMA or the courts in applying the enforcement framework under the Act. A forfeiture notice is not required to be given to a person for one or more alleged contraventions of one or more provisions subject to a forfeiture notice under this Division. The liability of a person who is not issued a forfeiture notice or who does not comply with a forfeiture notice is not affected. Nothing in this Division prevents the giving of 2 or more forfeiture notices to a person for one or more alleged contraventions of one or more provisions subject to a forfeiture notice under this Division. For example, where greater detail of the equipment involved in a breach comes to light after an initial forfeiture notice has been issued. This Division does not limit the courts' discretion to make a forfeiture order where a forfeiture notice could have been issued.

Section 283—Designated forfeiture officer

Section 283 provides that a designated forfeiture officer for the purposes of the Act is a member of the staff of ACMA authorised, in writing, by ACMA. The Chair of ACMA is automatically, by operation of the section, a designated forfeiture officer.

Division 4—Inspectors

Section 284—Inspectors

An inspector is a person who is a Commonwealth officer, an eligible State officer or a member of the Australian Federal Police (other than a special member) that has been appointed by ACMA as an inspector for the purposes of the Act. An eligible State officer is a person employed by or in the service of an eligible State on a full-time or part-time basis or a person that holds or performs the duties of an office or position established by an eligible State on a full-time or part-time basis. An eligible State is a State that has consented to being an eligible State for the purposes of the section. An eligible State may include the Australian Capital Territory or the Northern Territory.

Division 5—Monitoring and investigation powers

Section 284A—Monitoring powers

Section 284A triggers Part 2 of the Regulatory Powers Act thereby applying the compliance monitoring powers in the Regulatory Powers Act to the following provisions in the Act:

- an offence against a provision of Part 4.1;
- a civil penalty provision of Part 4.1;
- an offence against a subsection 284G(9);
- information given in compliance or purported compliance with a provision of Part 4.1 or subsection 284G(9).

The powers will enable certain inspectors to enter premises (either by consent or under a warrant) for the purposes of monitoring whether the relevant offence and civil penalty provisions are being complied with, or whether information given in compliance with relevant provisions is correct.

Unlike investigation powers, the inspector will not be required to have reasonable grounds to suspect that evidential material is on the premises to be issued a monitoring warrant. As a result, monitoring powers are less coercive than investigation powers. They may also be exercised by a more limited range of inspectors and cannot be used in relation to residential premises.

For the purposes of applying Part 2 of the Regulatory Powers Act to subsections 284A(1) and (2):

- an authorised applicant is an inspector but not a member of the police force of a State or Territory;
- an issuing officer is a Judge of the Federal Court or a Judge of the Federal Circuit Court who has consented to act as an issuing officer for the purposes of this Act, or a magistrate;
- the relevant chief executive is the Chair of ACMA or a person to whom they delegate their powers and functions as mentioned in subsection 284A(6);
- the relevant courts are the Federal Court and the Federal Circuit Court; and
- a premises is taken to include a vessel, an aircraft or a space object.

An authorised person may be assisted by other persons in exercising powers, or performing functions or duties, under Part 2 of the Regulatory Powers Act in relation to subsections 284A(1) and (2).

In executing a monitoring warrant, an authorised person and a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances. This is justified by the potential for harm to health and safety and the operation of services that rely on spectrum to provide critical services.

Section 284B—Investigation powers—general

Section 284B triggers Part 3 of the Regulatory Powers Act. This applies the framework of investigation powers to offence and civil penalty provisions of the Act. These powers will enable inspectors to enter premises (either by consent or under a warrant) for the purposes of gathering material that relates to the contravention of those offence or civil penalty

provisions. An inspector must have reasonable grounds to suspect that evidential material is on the premises to be issued an investigation warrant.

An offence against the Act has the extended meaning set out in Section 11.

For the purposes of applying Part 3 of the Regulatory Powers Act to relevant provisions in the Act:

- an inspector is an authorised applicant in relation to evidential material that relates to a provision mentioned in subsection 284B(1);
- an inspector is an authorised person in relation to evidential material that relates to a provision mentioned in subsection 284B(1);
- an issuing officer is a Judge of the Federal Court or a Judge of the Federal Circuit Court who has consented to act as an issuing officer for the purposes of this Act, or a magistrate;
- the relevant chief executive is the Chair of ACMA or a person to whom they delegate their powers and functions as mentioned in subsection 284B(6);
- the relevant courts are the Federal Court and the Federal Circuit Court; and
- a premises is taken to include a vessel, an aircraft or a space object.

An authorised person may be assisted by other persons in exercising powers, or performing functions or duties, under Part 2 of the Regulatory Powers Act in relation to the subsections 284G(1) and (2).

In executing an investigation warrant an authorised person and a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances. This is justified by the potential for harm to health and safety and the operation of services that rely on spectrum to provide critical services.

Part 3 of the Regulatory Powers Act, as it applies in relation to a provision mentioned in subsection 284B(1), has effect as if a reference in section 68 of that Act to the disposal of a thing included a reference to the disposal of a thing by way of destruction.

Section 284C—Identity card

Subsection 284C(1) provides that, for the purposes of subsection 284B(1), an authorised person who is a member of the Australian Federal Police or an eligible State police force may provide written evidence of the fact that they are a member of the relevant force instead of providing an identity card as required by paragraphs 55(6)(b) and 56(1)(b) of the Regulatory Powers Act.

Under subsection 284C(2), section 76 of the Regulatory Powers Act (relating to identity cards), so far as it applies in relation to a provision mentioned in subsection 284B(1) of the Act, does not apply to an authorised person who is a member of the AFP or an eligible State police force.

Section 284D—Retention of thing seized etc.

This section modifies the operation of provisions of the Regulatory Powers Act, as it applies in relation to a provision covered by subsection 284B(1), to allow for the retention of a thing seized that may have been used or otherwise involved in an offence or contravention of the Act or the Regulatory Powers Act to be retained for the duration of proceedings, regardless of whether the thing seized is used as evidence for those proceedings if proceedings are instituted within 60 days of the seizure.

These provisions ensure that a thing seized need not be returned prior to possible forfeiture of the thing under section 284J. Early return pending the finalisation of proceedings which may lead to the court making a forfeiture order may raise the risk of continued contraventions which may, for example, cause interference resulting in a danger to the safety of human life or significant loss or damage.

The section provides that ACMA may, by written instrument, authorise a thing seized under the Regulatory Powers Act, as it applies to subsection 284B(1), to be released to the owner or to the person from whom it was seized, either unconditionally or on conditions determined by ACMA. These conditions may include giving security for payment of the thing's value if it is forfeited under section 284J.

Section 284E—Securing evidential material

Subsection 284E(1) provides that if an authorised person enters premises with the consent of the occupier, and, during the exercise of their investigation powers, the authorised person finds a thing that they have reasonable grounds to believe is evidential material, the thing may be secured for a period of up to 24 hours by locking it up, placing guard or any other measures.

Under subsection 284E(2) the authorised person may apply to an issuing officer for an extension of the 24-hour period if the authorised person believes, on reasonable grounds, that the thing needs to be secured for longer than that period of time. However, subsection 284E(3) provides that the authorised person must first inform the occupier of the premises (or another person who represents the occupier) of their intention to apply for an extension under subsection 284E(2). The occupier is entitled to be heard in relation to that application.

For the purposes of this section, an authorised person, an issuing officer and evidential material have the same meaning as in Part 3 of the Regulatory Powers Act, as it applies in relation to a provision mentioned in subsection 284B(1) of the Act.

Subsection 284E(4) provides that the 24-hour period may be extended more than once.

Section 74 of the Regulatory Powers Act, as it applies in relation to a provision mentioned in subsection 284B(1), has effect as if a reference in that section to subsection 51(5) of that Act included a reference to subsection 284E(2).

Section 284F—Directions to licensees—managing interference with radiocommunications

Section 284F allows an inspector to give a written direction to the holder of an apparatus licence or a spectrum licence aimed at avoiding or reducing interference with radiocommunications, regarding the installation, maintenance or operation of a radiocommunications device operated under the licence.

A direction can also apply to all persons, specified persons or specified classes of persons authorised to operate radiocommunications devices under the licence.

If the holder of a spectrum or apparatus licence, or one of the people they have authorised, fails to comply with a direction, they are subject to a 30 penalty unit civil penalty under this section.

Section 284H—Powers of inspectors to require operation of transmitters

Under this section, an inspector who has reasonable grounds to believe that a transmitter has been, is being, or may be, operated so as to cause interference to radiocommunications, may, for the purposes of investigating the interference or risk of interference, direct a person to operate the transmitter. The inspector must not direct a person to operate the transmitter if the operation is likely to endanger the safety of a person or cause damage to property.

A person that operates a transmitter at the direction of an inspector does not commit an offence or contravene a civil penalty provision of the Act. Subsection 284H(3) uses the extended meaning of “offence against this Act” which is outlined in section 11.

Subsection 284H(4) makes it an offence to disobey a direction given by an inspector without a reasonable excuse as set out in @123.

Section 284J—General powers of inspectors

Section 284J provides for the general powers of inspectors in specified circumstances.

If an inspector suspects that a person has done an act which requires a licence, an authorisation in relation to a licence, a certificate of proficiency, or a permit under the equipment rules, the inspector may by written notice, require the person to produce the licence, authorisation, certificate or permit, or evidence of its existence and contents. The person must do this within a specified period of at least 14 days and in the manner specified by the written notice.

If an inspector suspects that the holder of a licence has given an authorisation in relation to the licence (to authorise third parties to operate radiocommunications devices under the licence), the inspector may, by written notice, require the holder to produce a record of the authorisation within a specified period of at least 14 days and in the manner specified in the written notice.

If an inspector suspects that a person is required by the equipment rules to retain a record, the inspector may, by written notice, require a person to produce the record within a specified period of at least 14 days and in the manner as specified in the notice.

Non-compliance with a written notice is made an offence and subject to a penalty of 30 penalty units.

Section 284K—Self incrimination

Section 284K abrogates the privilege against self-incrimination and exposure to a penalty by providing that an individual is not excused from giving information or producing a document under section 284J on the grounds that the information or document might tend to incriminate the individual or expose the individual to a penalty. However, the section includes constraints on the permitted use of documents obtained under section 284J. These constraints provide broad protections against criminal or civil proceedings for individuals who have provided self-incriminating information or documents, subject to the narrow exceptions outlined below. The common law privilege against self-incrimination only extends to natural persons, not to bodies corporate.

In the case of an individual, the document produced, or producing the document, or any information, document or thing obtained as a direct or indirect consequence of producing the document, is not admissible in evidence against the individual:

- in civil proceedings for the recovery of a penalty; or
- in criminal proceedings, except proceedings for an offence against section 137.1 or 137.2 of the Criminal Code (providing false or misleading information or documents) that relates to section 284J—i.e. an offence against either of those sections relating to compliance with the requirement to produce information or documents.

It is appropriate to abrogate the privilege against self-incrimination in these circumstances on the basis that relevant information may not otherwise be available to enforce the regime, and that the public benefit of effective enforcement mechanisms decisively outweighs the potential harm to the individuals concerned.

While disclosures cannot be used against the individual making the disclosure in any criminal proceedings or in any proceedings for contravention of a civil penalty, these disclosures can be taken into account for the purposes of a decision about whether to, for example, revoke a licence or any review of such a decision, or to take any other regulatory action in relation to a licence etc.

Division 6—Power of inspectors to enter premises and adjust transmitters in emergencies

Subdivision A—Power of inspectors

Section 284KA—Power of inspectors to enter premises and adjust transmitters in emergencies

Subsection 284KA(1) allows an inspector who believes on reasonable grounds that a transmitter is operating in unoccupied premises and the operation of the transmitter is interfering with radiocommunications that are essential to the safety of human life and that the circumstances are of such seriousness and urgency as to require and justify entry, to enter the premises and take the action they consider necessary to cause the transmitter to cease operating or to operate in a way that no longer gives rise to the consequences.

In exercising the power conferred by subsection 284KA(1), an inspector must try to minimise disruption to the transmitter.

Subsection 284KA(3) provides a similar power to subsection 284KA(1), where the transmitter is causing substantial loss or damage. However, subsection 284KA(4) specifies that this power can only be exercised under a transmitter access warrant.

In exercising the power conferred by subsection 284KA(3), an inspector must try to ensure that any disruption caused to the performance of the transmitter is no greater than is necessary to prevent the consequence set out in the subsection.

An inspector exercising a power under this section must, as soon as practicable, take all reasonable steps to notify the owner of the transmitter that the action has been taken.

Subdivision B—Investigation warrants

Section 284KB—Transmitter access warrants

Section 284KB sets out the process and conditions for an inspector to apply to an issuing officer for a transmitter access warrant.

It also sets out the matters the issuing officer must be satisfied of before issuing such a warrant.

Subsections 284KB(5) and (6) outline the content of the warrant, including the information it must include and what it must authorise an inspector acting under the warrant to do. Subsection 284KB(7) adds that the warrant must state during what hours entry is authorised.

Subsection 284KB(8) outlines the information the issuing officer must convey to the inspector who applied for the warrant, after the warrant is complete and signed.

Subsections 284KB(9), (10) and (11) set out further obligations on the inspector and issuing officer in relation to a transmitter access warrant.

Section 284KC—Offence relating to warrants

Section 284KC sets out a number of offences related to transmitter access warrants and the penalty.

Subdivision C—Issuing officers

Section 284KD—Issuing officer

This section sets out the definition of “issuing officer” for the purposes of the Act. An issuing officer may be a Judge of the Federal Court or a Judge of the Federal Circuit Court of Australia, under certain circumstances, or else a magistrate.

Section 284KE—Powers of issuing officers

This section sets out the powers of issuing officers. It specifies that a power conferred on an issuing officer by this Division is conferred in a personal capacity, does not need to be accepted by the individual and outlines the associated protection and immunity.

Division 7—Court ordered forfeiture

284L Court may order forfeiture

Where a court has convicted a person of an offence against the Act, or makes a civil penalty order for a civil penalty provision in the Act, the court may further order the forfeiture to the Commonwealth of the thing used in contravening the Act.

Section 284L uses the extended meaning of “offence against this Act” which is outlined in section 11.

Subsection 284L(3) allows ACMA to apply to the Federal Court or the Federal Circuit Court for a thing to be forfeited to the Commonwealth without the need for the court to make a civil penalty order against a person. The court must be satisfied that the thing to which the application relates was used or otherwise involved in a contravention of a civil penalty provision in the Act. This additional power of the court will, for example, allow ACMA to apply for the forfeiture of potentially dangerous or harmful equipment in circumstances where the regulator does not consider it necessary to pursue a civil penalty

order from the court. Forfeiture alone, in some circumstances, can serve as a sufficient regulatory deterrent towards the person who has allegedly contravened the Act whilst reducing the risk of further breaches of the legislation or interference to radiocommunications.

Section 284M—Forfeited goods may be sold, destroyed or otherwise disposed of

Section 284M provides that a thing forfeited under section 284L may be sold, destroyed or otherwise disposed of as directed by ACMA. Once an item is declared forfeit to the Commonwealth, it becomes the property of the Commonwealth. Before the thing is sold, destroyed or disposed of, the thing must be kept in such custody as ACMA directs.

Division 8—Public warning notices

Section 284N—Public warning notices

Section 284N provides that ACMA may publish a written notice containing a warning about particular conduct engaged in by a person if ACMA reasonably suspects that the conduct is in contravention of the provisions set out in paragraph 284N(1)(a) and ACMA is satisfied that one or more persons have suffered, or are likely to suffer, detriment as a result of the conduct and that it is satisfied that it is in the public interest to issue the notice. Public warning notices are also intended to provide a deterrent against breaches of the compliance provisions of the Act.

Division 9—Miscellaneous

Section 284P—Act not to affect performance of duties by inspectors

Section 284P provides that nothing in Chapter 3 or Part 4.1 or 4.2 prohibits the doing of any act or thing by an inspector in the performance of the inspector's duties under this Act or Part 3 of the Regulatory Powers Act.

Section—284Q—Inspectors not authorised to enter or search certain land or premises etc. used for defence purposes

Section 284Q restricts inspectors from entering or searching defence land, premises, vehicles and vessels etc. Only land or premises specified in the legislative rules are subject to the section. The Minister may specify land or premises directly, or by specifying a class of land or premises in accordance with subsection 13(3) of the Legislation Act 2003.

The section applies to any vessel, aircraft, space object or vehicle in the possession or control of the Defence Force, or a part of the Defence Force.

Where the section applies, the inspector must not enter or search the place unless permission to enter and search the land, premises or thing is given by the person who, at the time of the entrance or search, is in charge of the premises, land or thing. However, if it is not reasonably practicable to obtain the permission, entrance and search may still be done whilst under the supervision of a member of the Defence Force or a Defence Department employee, in either case, being a member or employee that is authorised to have access to the premises, land, vehicle etc. being searched.

Item 32—Paragraph 285(w)—Decisions that may be subject to reconsideration by ACMA

Section 285 sets out the decisions of ACMA that may be subject to reconsideration by ACMA. This item adds a decision under subsection 285(2) to give a remedial direction as one of the decisions set out under section 285.

Item 33—Part 5.8—Enforceable undertakings

Due to the adoption of the enforceable undertakings framework from the Regulatory Powers Act by other provisions within this Schedule, this item repeals Part 5.8 of the Act.

Item 34—Paragraphs 314(2)(d) to (f)—Regulations

Section 314 authorises the making of regulations. The power to make regulations in relation to payment as an alternative to prosecution, prescribing the forms of warrants for the purposes of section 269 and the imposition of functions, duties and powers on inspection as set out in paragraphs 314(2)(d) to (f) is repealed, due to the adoption of the framework from the Regulatory Power Act for monitoring, investigation and infringement notices.

Item 35—Section 315—Penalties payable instead of prosecution

With the adoption of the framework from the Regulatory Powers Act for civil penalties, the existing provisions dealing with civil penalties under the Act are repealed.

Part 2—Consequential amendments

Australian Communications and Media Authority Act 2005

Item 36—Section 67A—Liability for damages—public warning notices

Section 67A provides that the Commonwealth, ACMA and ACMA officials are not liable to an action or other proceeding for damages for, or in relation to, an act or matter done in good faith in the exercise, or purported exercise, of ACMA's power under section 284N.

Telecommunications (Interception and Access) Act 1979

Item 37—Paragraph 6(2H)(a)

Section 6 of the Telecommunications (Interception and Access) Act 1979 deals with interception of a communication. The amendment replaces the reference to “section 267” in paragraph 6(2H)(a) with a reference to “section 284” in the Act.

Item 38—Paragraph 6(2J) and paragraph 6(2K)

Paragraph 6(2J) provides that where an inspector who is lawfully engaged under section 284 of the Act in exercising powers under Part 2 of the Regulatory Powers Act, as it applies to subsection 284A(1) or subsection 284A(2) of the Act, incidentally listens to or records a communication passing over a telecommunications system, the act of listening or

recording does not, for the purposes of the Telecommunications (Interception and Access) Act 1979, constitute an interception of the communication.

Paragraph 6(2K) provides that where an inspector who is lawfully engaged under section 284 of the Act in exercising powers under Part 3 of the Regulatory Powers Act, as it applies to subsection 284B(1) of the Act, incidentally listens to or records a communication passing over a telecommunications system, the listening or recording does not, for the purposes of Telecommunications (Interception and Access) Act 1979, constitute an interception of the communication.

Part 3—Amendments contingent on the commencement of the Federal Circuit and Family Court of Australia Act 2020

Radiocommunications Act 1992

Items 39 and 40

Subject to the commencement of the Federal Circuit and Family Court of Australia Act 2020, paragraphs @269(3)(b), @271(3)(b), @272(3)(b), @284A(5)(b) and (10)(b), @284B(4)(b) and (9)(b) and @284KD(b) are amended by omitting “Federal Circuit Court of Australia” and substituting “Federal Circuit and Family Court of Australia”. Subject to the same contingency, subsection @284L(3) is amended by omitting “Federal Circuit Court of Australia” and substituting “Federal Circuit and Family Court of Australia”.

Part 4—Transitional provisions

Division 1—General

Item 41—Transitional—enforcement

Part 5.5 of the Act (as amended), so far as it relates to an offence or alleged offence, does not apply to an offence committed, or allegedly committed, before the commencement of this item.

Divisions 1, 2, 3, 5 and 6 of Part 5.5, paragraph 314(2)(e) and regulations made for the purposes of the paragraph continue to apply, in relation to an offence committed, or allegedly committed, before the commencement of the provision repealing those provisions.

Item 42—Transitional—appointment of a Commonwealth officer to be an inspector

An instrument made under paragraph 267(1)(a) (and a combination of this power and related powers under other Acts or regulations) relating to the appointment of a Commonwealth officer as an inspector prior to the paragraph being repealed continues to have effect as if it had been made under paragraph 284(1)(a) and is taken to satisfy any other requirement of the Act.

Item 43—Transitional—appointment of officers included in a class of Commonwealth officers to be inspectors

An instrument made under paragraph 267(1)(b) relating to the appointment of a class of Commonwealth officers as inspectors prior to the repeal of the paragraph continues to have effect as if it had been made under paragraph 284(1)(b) and is taken to satisfy any other requirement of the Act.

Item 44—Transitional—appointment of a State officer to be an inspector

An instrument made under paragraph 267(1)(a) relating to a State officer being appointed as an inspector prior to the repeal of the paragraph continues to have effect as if it had been made under paragraph 284(1)(c) and is taken to satisfy any other requirement of the Act.

Item 45—Transitional—appointment of officers included in a class of State officers to be inspectors

An instrument made under paragraph 267(1)(b) relating to the appointment of a class of State officers as inspectors prior to the repeal of the paragraph continues to have effect as if it had been made under paragraph 284(1)(d) and is taken to satisfy any other requirement of the Act.

Item 46—Transitional—identity card (monitoring powers)

An identity card issued to an inspector not being a police officer under subsection 268(1) continues to have effect as if it was made under subsection 35(1) of the Regulatory Powers Act and is taken to satisfy any requirements of the Act.

Item 47—Transitional—identity card (investigation powers)

An identity card issued to an inspector not being a police officer under subsection 268(1) continues to have effect as if it was made under subsection 76(1) of the Regulatory Powers Act and is taken to satisfy any requirements of the Act.

Division 2—Infringement notices

Item 48—Transitional—infringement notices

Despite the repeal of paragraph 11(2)(b), the paragraph continues to apply in relation to a payment made in relation to an offence allegedly committed before the commencement of this item, as if that paragraph had not been repealed.

Despite the repeal of section 315 and paragraph 314(2)(d) of the Act, that section, paragraph and regulations made for the purposes of the paragraph continue to apply, in relation to an offence allegedly committed before the repeal of the provisions and regulations.

Division 3—Enforceable undertakings

Item 49—Transitional—enforceable undertakings

An enforceable undertaking given by a person under section 298C before the repeal of the section continues to have effect as if it had been given under Part 6 of the Regulatory Powers Act and accepted by ACMA under that Part.

Part 5—Eligible States

Item 50—Eligible States—Consent and declaration

This item allows States to give consent under Subsection 284(5) as amended by this Schedule, as if Subsections 284(5) to (8) had commenced at the same time as this item. The commencement provisions of this Act provide for Part 5 of Schedule 6 to begin the day after the Act received Royal Assent. Subsections 284(5) to (8), on the other hand, are provided to commence along with the majority of the rest of the Act, on a date fixed by proclamation, or six months after the Act received Royal Assent.

This item therefore means that States could give consent for ACMA to consider them an eligible State from the day after the Act receives Royal Assent, allowing for the appointment of eligible State officers with less delay once those relevant provisions commence. The Acts Interpretation Act would allow certain appointments and instruments to be made in the period between Royal Assent and commencement, with these instruments and appointments to commence at the same time as the Act. This general power is not affected by the inclusion of this item.

SCHEDULE 7—INFORMATION GATHERING POWERS

Schedule 7 of the Bill inserts Part 5.5A into the Act to confer on ACMA certain information gathering powers, under which it may require a person to provide information, or produce a document, that relates to the supply or operation of radiocommunications devices and compliance or non-compliance with the conditions of licences. These information gathering powers also enable ACMA to seek information from a person that operates a radiocommunications device under a current licence or a licence that may be issued in the future, to assist ACMA in its spectrum management functions associated with planning the future use of the spectrum. ACMA will use these new powers to seek information and documents that are reasonably likely to assist ACMA in managing, limiting or preventing interference, or managing health and safety concerns.

For example, in an instance where ACMA is notified that a licensee is experiencing significant interference from a device, these powers enable ACMA to seek information about the device, including information from the operator of the device, and from this determine whether the device is compliant with its licence conditions and take appropriate measures where non-compliance is identified.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Part 5.5A—Information-gathering powers

Section 284R—Simplified Outline of this Part

Section 284R provides an outline of the powers contained in Schedule 7. This Part is focussed on providing ACMA with powers to require a person to give ACMA information or to produce to ACMA a document, so long as that document relates to the supply of radiocommunications devices, the operation of radiocommunications devices, the unlawful possession of radiocommunications devices, or the compliance or non-compliance with conditions of an apparatus licence or spectrum licence.

Section 284S—ACMA may obtain information or documents

Section 284S empowers ACMA to require a person to provide information or documents where ACMA believes on reasonable grounds that the person has such information or documents relating to:

- the supply (or offer to supply) of radiocommunications devices, where that information or document is relevant to the operation of the Bill, the 1992 Act or the equipment rules, including any interference with radiocommunications;
- the supply (or offer to supply) of radiocommunications transmitters, where that information or document is relevant to the operation of the Bill or the 1992 Act in so far as they relate to radio emissions that would be likely to adversely affect the

health or safety of individuals and resulting from a reasonably foreseeable use (including a misuse) of those transmitters;

- the supply (or offer to supply) of radiocommunications transmitters where that information or document is relevant to the operation of the equipment rules, in so far as they are directed towards protecting the health and safety of individuals from any adverse effect likely to be attributable to radio emissions resulting from a reasonably foreseeable use or misuse of those transmitters;
- the operation or potential future operation of one or more radiocommunications devices under an apparatus licence, class licence or a spectrum licence;
- compliance or non-compliance with one or more conditions of a current or future apparatus licence, class licence or a spectrum licence;
- the operation or possession, or possible future operation or possession of radiocommunications devices, where that operation or possession is not authorised under an apparatus licence, class licence or a spectrum licence.

ACMA may, by written notice, require the person to provide the information in the manner and form determined most appropriate by ACMA. This includes copies of any such documents as requested by ACMA. ACMA may also specify in the written notice the period of time in which the person must produce the information or documents to ACMA.

Paragraphs 284S(1)(d)-(g) are intended to enable ACMA to require licensees to provide information about how licences are used. For example, ACMA would be able to seek information about how intensively the spectrum is used, what it is used for, whether it is 'in use'. This is relevant to ACMA's administration of various parts of the Act, which have to do with planning, licensing (including renewal), interference management and compliance. These paragraphs empower ACMA to seek information from any licensee about future or potential use of spectrum under a licence, to enable ACMA to make spectrum planning decisions based on an understanding of planned and emerging spectrum uses.

ACMA may set a time period of no less than 14 days for a person to provide ACMA with the required information.

A civil penalty provision requires persons to comply with the requirement, subject to a maximum penalty of 20 penalty units.

This provision does not limit the powers of ACMA in any other provision that requires a person to provide information to ACMA, nor the power to make regulations, rules or any other legislative instrument.

Section 284T—Copying documents—compensation

A person who is required to make copies of documents pursuant to a written notice is entitled to be paid reasonable compensation if they fulfil the requirement. ACMA is required to make the compensation payment on behalf of the Commonwealth.

Section 284U—Copies of documents

ACMA may inspect a document or copy of a document that has been provided to ACMA under subsection 284S(2), and make and retain copies of, or take and retain extracts from that document. If a person has supplied a copy of a document to ACMA in accordance with paragraph 284S(2)(c), ACMA may retain possession of that copy.

Section 284V—ACMA may retain documents

Section 284V allows ACMA to retain possession of a document provided to them under subsection 284S(2), for as long as is necessary.

Subsection 284V(2) entitles a person to be supplied a certified true copy of the document being retained by ACMA.

Under subsection 284V(3), any such copy that is certified as a true copy by ACMA must be received in a court or tribunal as evidence, as if it were the original.

Subsection 284V(4) provides that until a certified true copy is supplied, ACMA must permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of, or take extracts from, the document. ACMA has discretion to determine an appropriate time(s) and place(s) for the person to inspect and copy or take extracts from the document.

Section 284W—Self-incrimination

Section 284W abrogates the privileges against self-incrimination and exposure to a penalty by providing that an individual is not excused from giving information or producing a document under section 284S on the ground that the information or document might tend to incriminate the individual or expose the individual to a penalty.

However, subsection 284W(2) includes constraints on the permitted use of information and documents that have been obtained under section 284S (both primary and derivative use). These constraints provide broad protections against criminal or civil proceedings for individuals who have provided self-incriminating information or documents. The exemption to this is for criminal proceedings relating to an offence against section 137.1 of 137.2 of the Criminal Code that relates to this Part. In part, section 137.1 of the Criminal Code makes it an offence for an individual to give false or misleading information to a person who is exercising powers under a law of the Commonwealth. Section 137.2 of the Criminal Code contains a like offence for the provision of false or misleading documents. In this instance, the information and documents can be used as admissible evidence against an individual. It is appropriate to abrogate the privilege against self-incrimination in these circumstances on the basis that relevant information may not otherwise be available to enforce the regime, and that the public benefit of effective enforcement mechanisms decisively outweighs the potential harm to the individuals concerned.

Part 2—Transitional provisions

Item 2—Transitional—section 284S of the *Radiocommunications Act 1992*

Section 284S of the Act empowers ACMA to require a person to provide information or documents in a number of instances, such as a person supplying, or offering to supply, radiocommunications devices or transmitters.

The transitional provisions stipulate that for the purposes of section 284S(1), excluding subsection 284S(1)(e), it is immaterial whether the acts mentioned occur or are proposed to occur before, at or after the commencement of the item.

SCHEDULE 8—MISCELLANEOUS

This Schedule includes amendments that apply across the Act, such as ACMA’s powers to grant exemptions from penalty provisions and ACMA’s ability to use computer assisted decision making, particularly in the renewal of licences.

Part 1—Amendment of the Radiocommunications Act 1992

Radiocommunications Act 1992

Item 1—Section 5—Definitions

This item inserts additional terms into the section by providing definitions for the terms ‘authorised defence supplier’, ‘constitutional corporation’, ‘engage in conduct’, ‘legislative rules’, ‘member of a civilian component of a visiting force’ and ‘member of a visiting force’. These terms are referenced throughout the legislation, and these definitions serve to clarify their intent and purpose. These terms clarify that:

- a constitutional corporation is a corporation to which paragraph 51(xx) of the Constitution applies
- engage in conduct includes both doing an act or omitting to do an act
- legislative rules means the rules that the Minister will have the power to issue under new subsection 313B, inserted by item 4.

Item 1A—Section 10B—Authorised defence supplier

This item defines an ‘authorised defence supplier’ for the purposes of this Act, to be a person who is a party to an agreement to supply goods or services to the Defence Force or the Defence Department. The agreement must be one that has been approved in writing by a member of the Defence Force or an officer of the Defence Department. An approval under subsection 10B(1) is not a legislative instrument. These approvals are documents related to the activities of authorised defence suppliers, rather than instruments that are intended to determine or alter the law.

Item 1B—Section 24—Defence exemptions

This item extends the existing Section 24 Defence exemptions, so that the provisions of the Act no longer apply to anything done or omitted to be done by a member of a visiting force, by a member of a civilian component of a visiting force, or by an approved defence supplier, under certain specified circumstances. These circumstances include where the activity is approved by the Defence Force or the Defence Department and where the purposes of the activity they undertake is related to research or intelligence. This extension is to ensure that contemporary operating contexts and associated operational requirements for Defence are reflected in the legislation.

Item 1BA—Section 24— Defence exemptions

This item adds subsection 24(3) and provides that an approval under paragraph 24(1A)(c) is not a legislative instrument. These approvals are documents related to the activities of visiting forces, rather than instruments that are intended to determine or alter the law.

Item 1C—Paragraph 26(1)(b)—Additional exemptions for defence matters

This item adds ‘safety’ and ‘security’ to the list of Defence functions or duties to which Parts 3.1, 4.1 and 4.2 of the Act do not apply, subject to other conditions outlined in Section 26. This acknowledges changes to Defence’s mandate and operational requirements in recent times, ensuring the legislation remains fit-for-purpose.

Item 1D—Subsections 26(1A) and 26(1B)

This item extends the Section 26 Defence exemptions, to also encompass anything done or omitted to be done by a member of a visiting force, by a member of a civilian component of a visiting force, or by an approved defence supplier, under certain specified circumstances. These circumstances include where the activity is approved by the Defence Force or the Defence Department and are also subject to the new Subsection 26(3), inserted by Item 1E. This is to ensure that contemporary operating contexts and associated operational requirements for Defence are reflected in the legislation.

Item 1E—Subsections 26(3), 26(4) and 26(5)

This item adds Subsections 26(3) and 26(4), which specify that the regulations may provide for the exemptions provided by Subsections 26(1A) and 26(1B) to no longer apply, in specified circumstances, to a member of a visiting force, a member of a civilian component of a visiting force, or an approved defence supplier.

Subsection 26(5) provides that an approval under paragraph 26(1A)(b) is not a legislative instrument. These approvals are documents related to the activities of visiting forces, rather than instruments that are intended to determine or alter the law.

Item 2—Subparagraph 68(2)(b)(i)—Conditions about third party use

This item omits the term ‘if applicable’ from this subparagraph, to clarify that registration requirements under Part 3.5 for operation of radiocommunications devices under the licence are always applicable and relevant considerations for third party use of licences.

Item 3—Subsection 69A(2)—Conditions about residency etc.

Subsection 69A(2) requires spectrum licences to stipulate that when an authorised person derives income from allowing third parties to operate radiocommunications under the license, either the authorised person must be an Australian resident or the income must be attributable to a permanent establishment in Australia used by the authorised person to conduct business. This item omits the current phrasing related to an authorised person and provides an alternative statement which clarifies the requirements on an authorised person, and corrects the legislative reference. This subsection no longer refers to allowing third parties to operate radiocommunications devices under the licence, as radiocommunications devices are only permitted to be operated by a licensee or an authorised person (not a third party allowed to operate a device by an authorised person).

Item 4—Subsection 69A(3)(definition of authorised person)

This item repeals the definition of authorised person in line with the amendments to subsection 69A(2) at item 2.

Item 5—Subsection 214(1)—Contravention of a direction

This item omits the numbering of this subsection, due to subsection 214(2) being repealed and making numbering unnecessary.

Item 6—Subsection 214(2)—Contravention of a direction

Subsection 214(2) provides a definition of ‘engage in conduct’ for the purposes of section 214. This item removes this subsection from the Act, as the definition can now be found in Section 5 as provided for by item 1.

Item 7—Paragraph 226(b)

Section 226 provides continuity for restrictive orders made during a period of emergency to remain in force if the period of emergency is extended, with a number of exemptions. This item amends paragraph 226(b) to remove the reference to section 48 of the *Acts Interpretation Act 1901* and substitutes it with a reference to section 42 of the *Legislation Act 2003*. This is necessary as section 48 of the *Acts Interpretation Act 1901* was repealed in 2003.

Item 8—Before paragraph 285(x)

Section 285 lists the decisions that may be subject to reconsideration by ACMA before AAT review. This item inserts a new paragraph 285(wb) to include in section 285 decisions of ACMA which are made under the legislative rules and declared by the legislative rules to be subject to section 285.

Item 9—Section 302—Exemptions

This item provides that section 302 be inserted. This section stipulates that several subsections are compliance provisions. This section provides that ACMA may grant an exemption from compliance with these compliance provisions. If ACMA determines that it will make an exemption, it must do so by a legislative instrument.

The legislative instrument may determine that one or more acts are exempt from a compliance provisions, one or more specified persons are exempt from the compliance provisions, or a combination of these two. In all instances, ACMA is able to make the exemptions based on conditions being met, and these conditions must be complied with.

Should ACMA make an exemption, it must be satisfied that doing so is in the public interest or that the exemption is of a kind specified in the legislative rules. As these exemptions are granted through a legislative instrument, section 17 of the *Legislation Act* also means that the instrument-maker must be satisfied that appropriate consultation has occurred. It is also worth noting that Section 197 (as amended), which prohibits the causing of interference, is not included under Section 302 as a compliance provision from which ACMA can grant an exemption. This will ensure protections remain in place for existing licensees and services, for example in the case that ACMA grants an exemption for the operation of a banned device capable of operating on frequencies that are covered by a spectrum licence or an apparatus licence.

It is intended that administrative decisions made under subsection (5) would be facilitated by a written notice, permit, or similar document. It is proposed that the administrative

decisions of this nature would be made in the form of a notifiable instrument, and registered on the Federal Register of Legislation (FRL) for reference and greater transparency. 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. There are a range of circumstances in which exemptions may be appropriate. These exemptions are designed to help promote innovation and industry development opportunities within Australia.

Item 10—Section 305A—Computerised decision-making

This item inserts Section 305A, which allows AMCA to use computer programs in the exercise of its powers and specifies how this system is applied in the legislative framework of the Act. This enables ACMA to arrange for computer programs under the control of ACMA to make decisions, exercise any powers, or do anything related to the making of a decision or complying with obligations. Should ACMA utilise a computer program for this purpose, it is determined to have made a decision or taken action for the purposes of the Act. This decision is able to be reviewed by ACMA at any time. Conversely, a decision made by a computer program must be overridden by ACMA if it is satisfied that the initial decision by the computer program is incorrect. Formalising this computerised process modernises the Act and ensures that it remains fit-for-purpose as technology presents increasing opportunity to streamline services, particularly routine administrative decisions such as the renewal of most apparatus licences.

Item 11—Section 308A—Compensation for acquisition of property

This item inserts section 308A, which is focussed on the matter of compensation for the acquisition of property that may occur. Under this item, if the operation of the Act, or a legislative instrument under the Act, would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person. The amount of compensation is to be determined by the Commonwealth and the person. If an agreement is not able to be found, then the person may proceed to the Federal Court or the Supreme Court of a State or Territory, and the court will determine the amount of compensation owed.

Item 12—313B—Legislative Rules

This item inserts Section 313B, which defines the term legislative rules and outlines their use and implementation for the purposes of the Act. This section stipulates that while the legislative rules are able to be made by the Minister as necessary for them to perform their functions, there are limitations on what legislative rules can be applied to. This includes imposition of taxes, powers of arrest or entry, and direct amendments to the text of the Act.

The amendments contained in the items of this Bill contain a number of references to the legislative rules, including requirements for the publication of recall notices, authorisations for accredited persons to charge fees, or circumstances in which ACMA is authorised to consider granting an exemption from compliance provisions of the Act.

Section 313B(3) provides that the legislative rules may make provision in relation to a matter by conferring a power to make a decision of an administrative character on ACMA.

Section 313B(4) provides that the legislative rules may make provision in relation to a matter by conferring a power to make a decision of an administrative character on a person who holds a specified kind of accreditation.

Section 313B(5) provides that the legislative rules may authorise a person who holds a specified kind of accreditation to charge fees in relation to the exercise by the person of a power conferred by the legislative rules. A fee must not be such as to amount to taxation.

Section 313B(6) provides that the legislative rules that are inconsistent with the regulations have no effect to the extent of the inconsistency, but legislative rules are taken to be consistent with the regulations to the extent that the rules are capable of operating concurrently with the regulations.

Part 2—Transitional provisions

Item 13 Transitional—spectrum licence condition about third party use

Item 2 repeals the words ‘if applicable’ from a condition to be included in spectrum licences about notifying persons authorised to operate radiocommunications devices under the licence of their obligations under this Act. Where a spectrum licence is in place at the commencement time, this item deems that all such licences have effect as if the words ‘if applicable’ are removed from this condition.

Item 14 Transitional—spectrum licence condition and residency etc.

Item 3 amends subsection 69A(2) so that it no longer refers to authorised persons allowing third parties to operate radiocommunications devices under a licence. This item deems that all spectrum licences in place at the commencement time are deemed to have effect as if the condition in them incorporates the new wording of section 69A(2).

Item 15—Constitutional safety net—acquisition of property

This item provides the same constitutional safety net as item 11, but in relation to the operation of the Radiocommunications Legislation Amendment (Reform and Modernisation) Act, whereas item 11 inserts section 308A to provide that safety net for the Act.

SCHEDULE 9—DATACASTING

Schedule 9 of the Bill repeals the datacasting transmitter licence framework. This licensing framework has not been used to date.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Section 5—Definitions

Item 1 repeals a number of definitions related to the datacasting transmitter licence framework (*channel A datacasting transmitter licence, channel B datacasting transmitter licence, community television broadcasting service, datacasting transmitter licence and domestic digital television receiver*). All references to these terms elsewhere in the Act are repealed or omitted by other items in Schedule 9, so it is appropriate to repeal them.

Items 2—6—Part 3.3

Items 2 through to 6 remove references to divisions, sections and terms in the Act that have been repealed by other items in Schedule 9. These items also repeal sections 98A, 98B and 102B, all of which relate to the datacasting transmitter licence type, including channel A datacasting transmitter licences and channel B datacasting transmitter licences.

Items 7—39—Datacasting transmitter licences

Items 7 through to 39 of Schedule 9 to the Bill make necessary changes to the Act in order to repeal the datacasting transmitter licence framework. These include repealing those parts of the Act that deal with datacasting transmitter licences, removing references to provisions in the Act that have been repealed by other items in Schedule 9 and making relevant editorial changes.

Item 15 removes a reference to Section 293 of the Act, which has previously been repealed, and replaces this with a reference to Section 60 of the ACMA Act, which permits ACMA to impose charges for the services that it provides.

Item 40—Division 2 of Part 5.6

Item 40 repeals Division 2 of Part 5.6 of the Act. All the sections, subsections and paragraphs listed in this division, as well as the decisions they relate to, have been repealed by other items in Schedule 9. As such, it is appropriate to repeal this division.

Part 2—Other amendments

Australian Communications and Media Authority Act 2005

Item 41—Subparagraph 9(h)(i)

Section 9 of the ACMA Act specifies the spectrum management functions of ACMA. Subparagraph 9(h)(i) makes it so that these spectrum management functions include functions conferred by the Act, other than functions specified in paragraph 10(1)(p) of the ACMA Act.

Item 41 removes from Subparagraph 9(h)(i) the mention to provisions of the Act covered by Paragraph 10(1)(p) of the ACMA Act. The provisions covered by Paragraph 10(1)(p) are the functions conferred on ACMA that relate to datacasting transmitter licences. Paragraph 10(1)(p) of the ACMA Act is repealed by Item 42 in Schedule 9, so it is appropriate to omit this mention in Subparagraph 9(h)(i).

Item 42—Paragraph 10(1)(p)

Section 10 of the ACMA Act specifies the broadcasting, content and datacasting functions of ACMA. Item 42 repeals Paragraph 10(1)(p) of the ACMA Act, which refers to ACMA's functions related to datacasting transmitter licences under the Act. The provisions referred to in Paragraph 10(1)(p) have been repealed by other items in Schedule 9, so it is appropriate to repeal this paragraph.

Broadcasting Services Act 1992

Items 43—49—Sections 6 and 7—Interpretation

Sections 6 and 7 of the Broadcasting Services Act deal with interpretation. Section 6 provides definitions of terms used within the Broadcasting Services Act.

Items 43 through to 49 of Schedule 9 to the Bill repeal or replace definitions, parts of definitions and notes that relate to the datacasting transmitter licence framework and other repealed parts of the Broadcasting Services Act.

Items 50—62—Part 5—Control of datacasting transmitter licences

Part 5 of the Broadcasting Services Act deals with control of commercial broadcasting licences and datacasting transmitter licences. This Part imposes limits and controls that aim to prevent undue media concentration.

Items 50, 52 and 54 of Schedule 9 of this Bill relate to consequential changes required by the repeal of Subdivision B of Division 2 of Part 5 and Subdivision B of Division 3 of Part 5 of the Broadcasting Services Act, as well as to remove mentions of datacasting transmitter licences.

Item 51 of Schedule 9 of this Bill repeals Section 51A of the Broadcasting Services Act, which relates to certain channel B datacasting transmitter licences. As this licence type is being repealed, this section is no longer relevant and it is appropriate to repeal it.

Item 53 and Item 55 of Schedule 9 of this Bill repeal subdivisions that place restrictions on licensees that hold a datacasting transmitter licence. As this licence type is being repealed, these subdivisions are no longer relevant and it is appropriate to repeal them.

Items 56 through to 62 of Schedule 9 of this Bill also remove mentions of datacasting transmitter licences throughout Part 5 of the Broadcasting Services Act.

Item 63—Subsection 130A(7) (note 6)

Item 63 of Schedule 9 of this Bill repeals a note in the Broadcasting Services Act that makes reference to datacasting transmitter licences and Section 109A of the Act. As Section 109A of the Act is repealed by Item 16 of Schedule 9 of this Bill, it is appropriate to repeal the note.

Item 64—Paragraph 130F(1)(h)

Item 64 of Schedule 9 of this Bill removes a paragraph in the Broadcasting Services Act related to operating a transmitter under a datacasting transmitter licence.

Item 65—Subsection 212(2B)

Item 65 of Schedule 9 of this Bill removes a subsection in the Broadcasting Services Act related to breaches of the conditions of a datacasting transmitter licence under the Act. As this licence type is being repealed, it is appropriate to repeal Subsection 212(2B).

Items 66—73—Schedule 1—Control and ownership

Schedule 1 of the Broadcasting Services Act deals with control and ownership of company interests. It provides a means of finding out who is in a position to exercise control of a number of different types of licences, including datacasting transmitter licences.

Items 66, 67, 68 and 71 of Schedule 9 of this Bill remove mentions of datacasting transmitter licences and datacasting industries, found in Schedule 1 of the Broadcasting Services Act. As the datacasting licensing framework in the Act is being repealed by other items in Schedule 9 of this Bill, it is appropriate to remove these mentions.

Item 69 of Schedule 9 of this Bill repeals Paragraph 2(1)(ba) of Schedule 1 of the Broadcasting Services Act, relating to licensees that hold a datacasting transmitter licence. Item 70 of Schedule 9 of this Bill repeals Subclause 2(2A) of Schedule 1 of the Broadcasting Services Act, which outlines situations where the paragraph repealed by Item 69 does not apply. It is therefore appropriate to repeal both provisions.

Items 72 and 73 repeal paragraphs that apply only to datacasting transmitter licences or licensees.

Items 74—94—Schedule 4—Broadcasting

Schedule 4 of the Broadcasting Services Act relates to digital television broadcasting and various requirements imposed on owners and operators of broadcasting transmission towers, including in relation to datacasters.

Items 74, 75, 76, and 79 remove references to datacasters and datacaster licences. As Items 77 and 78 repeal the definitions of *datacaster* and *datacasting transmitter licence*, it is appropriate to repeal those other references as well.

Item 83 and Item 88 repeal subclauses related to datacasters.

Items 80, 81, 82, 84, 85, 86, 87, 89, 90, 91, 92, 93 and 94 remove references to subclauses within Schedule 4 of the Broadcasting Services Act that have been repealed by other items in this Schedule of the Bill, or make consequential editorial changes.

Items 95—97—Schedule 6—Datacasting services

Schedule 6 of the Broadcasting Services Act sets up a system for regulating the provision of datacasting services.

Item 95 repeals the definition for *nominated datacaster declaration*. *Nominated datacaster declaration* means a declaration under Clause 45 of Schedule 6 of the Broadcasting Services Act, which is repealed by Item 96 of this Schedule to the Bill. As such, it is appropriate to repeal the definition.

Item 96 repeals Part 6 and Part 7 of Schedule 6 of the Broadcasting Services Act. Part 6 of Schedule 6 of the Broadcasting Services Act relates to the control of datacasting transmitter licences. Datacasting transmitter licences are being repealed by other items in this Schedule to the Bill, so it is appropriate to repeal this part of the Broadcasting Services Act. Part 7 of Schedule 6 of the Broadcasting Services Act relates to nominated datacaster declarations. Nominated datacaster declarations are applied for by licensees of datacasting transmitter licences. As datacasting transmitter licences are being repealed by other items in this Schedule to the Bill and the definition is repealed by Item 95, it is appropriate to repeal this part of the Broadcasting Services Act.

Item 97 repeals table items that set out reviewable decisions related to nominated datacaster declarations. Since these relate to clauses that are repealed by Item 96 of this Schedule of the Bill, it is appropriate to repeal these table items.

Competition and Consumer Act 2010

Items 98 and 99—Section 155—Power to obtain information, documents and evidence

Section 155 of the Competition and Consumer Act deals with the power to obtain information, documents and evidence, including on matters that constitute or may constitute a contravention of the Act.

Items 98 and 99 remove references to Division 4A of Part 3.3 of the Act, which is being repealed by Item 24 of this Schedule to the Bill. As such, it is appropriate to remove these references.

Item 100—Subsection 155AAA(21) (paragraph (d) of the definition of *protected information*)

Section 155AAA of the Competition and Consumer Act relates to the protection of certain information and the disclosure of protected information. Item 100 omits references to Section 118C and Section 118G of the Act. As these two sections are part of Division 4A

of Part 3.3 of the Act, they are repealed by Item 24 of this Schedule of the Bill. As such, it is appropriate for these references to be removed from the Competition and Consumer Act.

Income Tax Assessment Act 1997

Item 101—Paragraph 40-30(2)(g)

Section 40-30 of the Income Tax Assessment Act outlines what a depreciating asset is. Item 101 repeals a reference within this section to datacasting transmitter licences.

Items 102 and 103—Section 40-70 and Section 40-72—Depreciating assets

Section 40-70 and Section 40-72 of the Income Tax Assessment Act outline the diminishing value method for working out the decline in value of a depreciating asset. Item 102 and Item 103 each repeal a reference within these sections of the Income Tax Assessment Act to a datacasting transmitter licence.

Item 104—Subsection 40-95(7) (table item 10)

Subsection 40-95(7) of the Income Tax Assessment Act lists the effective life of certain intangible depreciating assets. Item 104 repeals a table item related to datacasting transmitter licences. As Item 101 of this Schedule to the Bill removed datacasting transmitter licences from the list of depreciating assets at Section 40-30 of the Income Tax Assessment Act, it is appropriate to repeal this table item.

Item 105—Subsection 995-1(1) (definition of *datacasting transmitter licence*)

Division 995 of the Income Tax Assessment Act provides definitions. Item 105 repeals the definition for datacasting transmitter licence. Within the Income Tax Assessment Act, datacasting transmitter licence has the meaning given by Section 5 of the Act. This definition within the Act is repealed by Item 1 of this Schedule to the Bill. As such, it is appropriate to repeal the definition in the Income Tax Assessment Act as well.

Part 3—Transitional provisions

Item 106—Application—amendments of the *Income Tax Assessment Act 1997*

Item 106 will save the provisions related to datacasting transmitter licences within the Income Tax Assessment Act that are repealed by other items in this Schedule to the Bill, for the purposes of datacasting transmitter licences that were in existence before the amendments came into effect (if any).

Item 107—Transitional—section 155 of the *Competition and Consumer Act 2010*

Item 107 saves provisions that would allow the ACCC to seek information, documents and evidence related to matters that constituted or may have constituted a breach of Division 4A of Part 3.3 of the Act, before being repealed by Item 24 of this Schedule to the Bill.

Item 108—Transitional—section 155AAA of the *Competition and Consumer Act 2010*

Item 108 saves provisions related to protected information in the Competition and Consumer Act, with regard to information that was obtained by the ACCC under Section 118C and Section 118G of the Act before being repealed by Item 24 of this Schedule of the Bill.

SCHEDULE 10—PUBLIC INQUIRIES

Part 5.2 of the Act gives ACMA the power to hold a public inquiry about any matter relating to the management of the radiofrequency spectrum or any other aspect of radio emissions. This part also outlines the processes to be followed in such a situation and the requirements on ACMA.

This power has not been used to date and Schedule 10 of the Bill contains provisions that would repeal this unused part of the Act.

Part 1—Amendment of the Radiocommunications Act 1992

Item 1—Subsection 231(3)

Item 1 of Schedule 10 to the Bill removes mention of Part 5.2 from the Outline of this Chapter at Section 231 of the Act.

Item 2—Part 5.2

Item 2 of Schedule 10 repeals Part 5.2 of the Act. These provisions, granting ACMA the power to hold public inquiries into any matter relating to the management of the radiofrequency spectrum or any other aspect of radio emissions, have not been used to date.

Part 2—Other amendments

Australian Communications and Media Authority Act 2005

Item 3—Section 3 (definition of inquiry)

The definition of *inquiry* in the ACMA Act currently refers to ACMA's power to conduct inquiries under both Part 5.2 of the Act and Part 25 of the *Telecommunications Act 1997*.

Item 3 of Schedule 10 repeals and substitutes the definition of *inquiry* in the ACMA Act. As a result of the repeal of Part 5.2 of the Act by Item 2 of this same Schedule, the reference to Part 5.2 of the Act in the definition is now redundant and can be repealed.

Item 4—Paragraph 4(2)(b)

Section 4 of the ACMA Act defines when an inquiry ends for the purposes of the ACMA Act.

Item 4 repeals paragraph 4(2)(b) of the ACMA Act. As a result of the repeal of Part 5.2 of the Act by Item 2 of this same Schedule, the reference to Section 261D of the Act is now redundant and can be repealed.

SCHEDULE 11—DURATION OF LICENCES

Schedule 11 increases the maximum duration of both spectrum licences and apparatus licences to 20 years, as a way of adding flexibility to the licensing framework. This will help ACMA make decisions which balance the benefits that longer licences can present in some cases (by providing greater certainty and encouraging innovation and investment) with the need to retain flexibility in spectrum management processes (such as by issuing shorter duration licences where appropriate) in order to adapt to changing circumstances.

Radiocommunications Act 1992

Item 1—Subsection 65(3)—Duration of spectrum licences

This item extends the maximum duration of spectrum licences from 15 years to 20 years. The proposed extension of the maximum duration of both spectrum licences and apparatus licences is intended to provide greater certainty to licensees (where appropriate), and encourage innovation and investment, while retaining flexibility in spectrum management processes.

Item 2—Subsection 103(3)—Duration of apparatus licences

This item extends the maximum duration of apparatus licences from 5 years to 20 years. This will align apparatus licence terms with the changes made to spectrum licences by Item 1 and help provide ACMA with additional discretion in how it issues apparatus licences as the spectrum needs and uses change.