LEGAL ANALYSIS OF ACA PROPOSALS FOR REFORM OF DEVICE REGISTRATION PROCEDURES UNDER SPECTRUM LICENSING

This paper examines the legal issues that arise out of the reforms to procedures for the registration of devices for operation under spectrum licences issued under the *Radiocommunications Act 1992* ('the Act') that were proposed by the ACA in a document, dated 1 December 2004, placed on its website and entitled 'Implementation of improvements to device registration under spectrum licensing'. The issues taken into account by the ACA in reaching its decision to implement the proposed reforms are set out in a paper entitled 'Improved device registration procedures under spectrum licensing', considered by the ACA's Radiocommunications Steering Committee on 18 November 2004 ('the RSC Paper'), a copy of which may be obtained from the ACA.

2. In summary, the conclusions reached in this paper are that:

(a) if implemented as proposed, the proposed reforms would remove some of the spectrum access rights of existing spectrum licensees;

(b) implementation of the reforms by the ACA would be variously open to challenge on the ground that:
   (i) in reaching decisions in the course of implementing the reforms the ACA has had, or will have regard to irrelevant considerations;
   (ii) in reaching decisions in the course of implementing the reforms the ACA has failed, or will have failed to have regard to relevant considerations;
   (iii) it would effect an acquisition of the property of spectrum licensees contrary to placitum 51(xxxi) of the Constitution.

3. To assist understanding of the issues, some background material is set out below on the content of spectrum access rights, and the management of interference under spectrum licensing. That material is followed by the reasoning that has been followed in coming to the conclusions set out above. Except where indicated otherwise, a reference in this advice to a provision is a reference to the relevant provision of the Act.

Content of Spectrum Access Rights under Spectrum Licensing

4. The genesis of the concept of spectrum licensing, which was introduced with a range of other spectrum licensing reforms under the Act, was the Occasional Paper 102 'Management of the Radio Frequency Spectrum' produced by the Bureau of Transport and Communications Economics in September 1990. That paper argued for the introduction of spectrum access rights, and at pages 80-81 the paper indicated that '…all [spectrum licensees] could operate as many services as they wished, using any sized bandwidth or means of operating the services, providing they did not exceed their interference rights' (emphasis added).

5. This formulation of spectrum access rights illustrates one of the many paradoxes of spectrum management legislation, that is, the almost total absence of any direct reference to the concept of 'protection'. The protection of services is central to the use of radiocommunications and consequently much beloved of radiocommunications engineers. Put simply, if a licensee or its customers cannot receive a signal because it is suffering interference from emissions from a transmitter operated by another person, a right to transmit is totally useless. Spectrum licensees must be able to confidently plan and establish their networks to provide services to their customers. To be able to do so, and justify the expenditure of the frequently vast sums of money required to roll out a network, they must have confidence that if they receive inappropriate interference to their services, they may either bring an action against any offending spectrum licensee under section 50 of the Act or, where necessary, rely on the ACA to take regulatory action to enforce their right to protection.

6. In common with the radiocommunications legislation of most, if not all jurisdictions, the right to protection of any particular licensee is not conferred positively, but instead is expressed by means of conditions on the manner in which other licensees may operate their transmitters. The absence of the

word 'protection' from the Act does not mean that the concept does not exist. Indeed, the fact that any spectrum licensee establishes any network at all is solely due to the fact that, while substantive rights to claim protection from certain levels of interference are not expressly conferred by the Act, they are inherent in the fabric of the legislative scheme. Accordingly, the spectrum access rights conferred by spectrum licences are:

(a) a right to emit radiation into, and so give rise to a certain level of interference in, the spectrum space of neighbouring spectrum licensees; and
(b) a correlative right to protection from interference above those levels to the services provided by a spectrum licensee to receivers within the geographic areas of its licence.

7. The original policy intention was that the spectrum access rights of spectrum licensees would be defined by the core conditions of the licences. This is reflected in the fact that:

(a) the core conditions of a spectrum licence cannot be altered without the consent of the spectrum licensee (see sections 72 and 73 of the Act); and
(b) a spectrum licensee is only liable to another spectrum licensee for the consequences of interference that arises out of the operation of a transmitter in a way that is not authorised by a licence (see section 50 of the Act).

8. It was recognised early in the implementation of the spectrum licensing regime, however, that reliance on the core conditions alone would be insufficient to afford prospective licensees with the commercial certainty required to expend large sums of money on acquiring spectrum. In practice, the rights to interfere and claim protection from interference could not be adequately expressed in the limited terms allowed by the core condition provisions. Some further interference mechanisms had to be addressed if the purchasers of spectrum were to be attracted. This was not a problem in technical terms, as the necessary operating parameters and conditions could be developed. The real problem lay in how best to entrench those spectrum access rights within the existing legislative regime.

9. The 'entrenching' of spectrum access rights under spectrum licences is particularly important because, except in very limited circumstances not relevant here, those licences may only be obtained through auction, tender or by payment of a negotiated or predetermined price. The Macquarie Dictionary (Revised 3rd Edition) relevantly defines:

- 'auction' to mean a public sale at which property or goods are sold to the highest bidder; and
- 'tender' to mean an 'offer'; and
- 'price' to mean the sum or amount of money, or its equivalent, for which something is bought, sold or offered for sale.

The Act similarly adopts the terminology of commercial dealings in its reference to 'marketing plans' in Part 2.2. It would appear reasonably clear, therefore, that the Parliament intended that the allocation of spectrum licences should be more akin to a commercial dealing than the mere dispensation of a licence in the exercise of some prerogative power.

10. Despite referring to the processes of auctioning, tendering and negiotating a price, the Act does not refer to the 'sale' of licences but to their 'allocation'. This terminology merely recognises the reality that, until a licence is issued, there is nothing to sell. The most that could be sold before issue would be a right to the issue of a licence, and this would have seriously complicated both the process of 'sale' and the legislation. The better view would appear to be that the Act evinces a clear intention that the issue of spectrum licences should take place in a form of quasi-contractual dealing between the ACA and prospective applicants. The quasi-contractual nature of the dealings is reflected in such documentation as the 'Deed of Acknowledgment' required by the allocation procedures. It is also reflected in the fact that prior to every spectrum auction the prospective licensees have been greatly concerned to know precisely what spectrum access rights they will obtain in return for the sums of money that they pay to the Commonwealth. In this regard the price-based allocation of spectrum is no different to any other

commercial dealing, in which certainty is always a primary consideration. Indeed, when price-based allocations of spectrum were developed by the former Spectrum Management Agency (first for the allocation of apparatus licences and later for the allocation of spectrum licences), considerable resources were expended in achieving the degree of certainty, as regards both the allocation system and the spectrum rights, that would allow prospective licensees to commit major funds. The success of that approach is reflected in the success of the allocations, which have not suffered in any way from the difficulties experienced in overseas jurisdictions.

11. It is not possible to entrench a right to protection of the services of one spectrum licensee by imposing a condition on the spectrum licence of another – even if the condition is imposed as a core condition. A condition of a spectrum licence, including a core condition, can always be varied with the agreement of a spectrum licensee (see sections 72 and 74 of the Act). As a result, it would be possible for the protection right of a spectrum licensee to be adversely affected by an administrative decision of the ACA in favour of another spectrum licensee. A spectrum licensee affected by a decision of the ACA to agree to vary the licence of another spectrum licensee so as to reduce the protection afforded to the first-mentioned licensee has no right to the review of such a decision on its merits. Section 285 of the Act provides a right of appeal only where the ACA varies a licence under section 73 without the agreement of a licensee (and in a couple of other cases not relevant here (see section 285(a)), and that right is confined to the spectrum licensee whose licence is varied.

12. Furthermore, if protection rights were contained entirely in licence conditions the ACA could not necessarily always control the variation of those conditions. Section 285 of the Act provides for reconsideration of a number of decisions, one of which is 'variation of a spectrum licence'. It is not clear if that provision extends to review of a decision to refuse variation, although it is highly likely that it would be held to do so. If so, and a spectrum licensee sought variation of its licence in a manner that would reduce the protection afforded to other spectrum licensees, and the ACA refused that variation, the licensee could appeal to the AAT for reconsideration of that decision. This would give rise to a considerable degree of uncertainty for prospective licensees, whose spectrum utility could depend upon an administrative decision taken by a body without any expert knowledge in the field. This should not be taken to suggest, of course, that the AAT is not competent to deal with such issues. However, as illustrated by paragraphs 36-46 below describing the difficulties of the Productivity Commission in coming to terms with only one spectrum licensing concept, those without appropriate knowledge may face formidable difficulties in dealing with highly complex technical issues. In the context of price-based allocations, even the possibility of such uncertainty was something to be avoided.

13. The mechanism adopted to achieve the necessary degree of certainty was to define the core elements of spectrum access rights by means of the section 145 Determination of unacceptable interference. A change to the section 145 Determination would necessarily impact on all spectrum licensees, and in practice it would be next to impossible for the protection afforded to any particular licensee to be reduced through this mechanism. Accordingly, a change in protection rights would, on the surface at least, apply to all spectrum licensees equally. Furthermore, licensees adversely affected could have recourse to judicial review of any decision to amend the section 145 Determination (see paragraphs 19-30 below), although such a right of review is restricted to essentially procedural grounds.

Interference Management under existing Technical Frameworks

14. As explained above, the core conditions and section 145 Determinations were used by the ACA to define the spectrum access rights offered at auction. A spectrum licensee exercises those rights by operating a transmitter in accordance with the relevant core conditions and registered device details. That does not mean, however, that those spectrum access rights are not subject to some additional constraints. The position is analogous to that of eg the holder of a driving licence. A driving licence confers a right

on the recipient to drive a vehicle of a certain type in certain places. However, that does not mean that the right to do so is not confined by a range of measures aimed at ensuring that when doing so the driver does not interfere with the right of other drivers to use the same public road, such as the requirement to drive on the left hand side of the carriageway.

15. The situation as regards spectrum licensees is precisely the same – they have a right to 'drive' their transmitters in certain places, and are subject to additional requirements to ensure that they do not interfere with other existing services when they do so. Thus, the Applicant Information Package for the various allocations contain statements similar to the one set out below which appeared in relation to the 3.4 GHz Band.

> *'Applicants should be aware that they will need to co-ordinate services to be operated under the spectrum licences with both existing and future apparatus licensed services outside the spectrum to be allocated, and with existing apparatus licensed services during the re-allocation period inside the boundaries of the spectrum being allocated. Furthermore, in some cases spectrum licensees will have to co-ordinate their services with other spectrum licensees, and the ACA* ***will not play a role in that co-ordination****. The co-ordination requirements will be set out in s.145 Determinations and s.262 advisory guidelines as issued and varied from time to time by the ACA. Copies of the s.145 Determinations and s.262 advisory guidelines that will be applied from the time of the spectrum allocation are included in the attachments to this package of documents'.*

16. What these statements in the Information Memorandums conceal is, of course, that such co-ordination is required because the ACA has effectively outsourced responsibility for the management of interference to other services from spectrum licensed services to spectrum licensees themselves. This is reflected in the fact that the Guidelines are advisory only, and the practice in the industry itself which sees APs issuing certificates for section 145(1) (IICs) without having conducted the compatibility checks established by the Guidelines because the spectrum licensees have assumed the risk.

17. The important issue here, however, is to recognize that the option of coordination under the section 262 Guidelines referred to here has absolutely nothing to do with the issue of compliance with either the core conditions of a licence, or the requirements of the section145 Determinations that establish the spectrum access rights of spectrum licensees.

Interim Summary

18. In summary to this point therefore:

(a) the spectrum access rights acquired by a spectrum licensee at a price-based allocation are:
- to give rise to interference, up to a specified degree, to the services of others
- to claim protection for one's own services from interference beyond that specified degree

(b) both the core conditions of the licence and the device registration requirements together determine the nature and extent of spectrum access rights acquired
- for this reason both the core conditions and the existing section 145 Determinations are essential tools in providing the commercial certainty to prospective applicants
- absent that certainty either no price-based allocation would have succeeded, or if they had succeeded the bid prices achieved would have reflected the increased commercial uncertainty and so been far lower

(c) the spectrum access rights of a spectrum licensee are subject to the need to coordinate its services with certain other services operated by spectrum and/or apparatus licensees
- guidance on how to carry out that coordination is provided for accredited persons by Guidelines made by the ACA under section 262 of the Act, and in other ACA documents.

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Are ACA Decisions in relation to the Proposed Reforms open to Judicial Review?

19. For a decision of the ACA to be subject to review under the *Administrative Decisions (Judicial Review) Act 1977* ('the ADJR Act') it must be administrative in nature. The ACA has stated that to implement its decisions on the proposed reforms, it will amend the following instruments made under the Act:

- Radiocommunications (Accreditation – Prescribed Certificates Principles 2003
- Radiocommunications (section 145(3) Certificates) Determination 2000
- Radiocommunications Advisory Guidelines (Registration of Devices under Spectrum Licences without an Interference Impact Certificate) 1998
- Radiocommunications (Third Party Use – Spectrum Licence Rules 2000 (No. 2)

Accordingly it is important to know whether these instruments are administrative or legislative in nature.

20. A general proposition for the distinction between legislative and administrative acts is given in de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* 5th Ed 1995 at 1006:

> *'A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy…'*

However, a clue as to the complexity of the issue is given by the immediately following statement::

> *'Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinions of judges as to the proper characterisation of a statutory function is at variance*'.

21. Latham CJ also addressed the issue in *Commonwealth* v *Grunseit* (1943) 67 CLR 58 at 82 as follows:

> *'The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases*'.

Once again, however, some doubt was cast on the ease with which one can adopt even this formulation by his Honour's preceding statement that it is "not always easy to draw this distinction".

22. Gummow J in *Queensland Medical Laboratory* v *Blewett* (1988) 84 ALR 615 at 635 put forward two further propositions which might be used in determining the nature of an action. The first, paraphrased, is that a norm, though not of general application, may nevertheless qualify as a law, so that:

> *'it is difficult to see how a sufficient distinction between legislative and administrative acts is that between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases*'.

The second proposition is:

> *'... that to take [a] step which has the immediate effect of changing the content of a law as a rule of conduct or declaration of power, right or duty, is to act legislatively*'.

23. The distinction between the two types of action was most recently addressed by Lehane J in *Federal Airports Corporation v Aerolineas Argentinas & Ors* [1997] 723 FCA. In his judgment his Honour stated:

> *'[i]f there is anything that the authorities make plain….it is that general tests will frequently provide no clear answer'.*

His Honour concluded that the only way to arrive at the correct conclusion is to examine closely the particular provisions and the particular circumstances. In arriving at his conclusion in Blewett (*supra* at 638) that the Minister made a decision of a legislative rather an administrative character, Gummow J apparently regarded it significant that the Minister's Determination was subject to parliamentary disallowance.

24. Taking the above into account, it would seem reasonably clear that, because section 262 Guidelines are advisory in nature, their making by the ACA is an administrative action. It also seems reasonably clear that given their content, and the fact that they are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*, the *Radiocommunications (Accreditation – Prescribed Certificates Principles 2003* and the *Radiocommunications (Third Party Use – Spectrum Licence Rules 2000 (No. 2)* are legislative in nature. The status of Determinations made for section 145(4) is, however, far less clear.

25. To understand the nature of a section 145 Determination it is necessary to understand its place within the regulatory scheme. Determinations of unacceptable interference are coupled with a requirement for registration of devices prior to their operation imposed by licence condition on every spectrum licence. However there is no instrument of the ACA that either directly imposes an obligation to provide an IIC, or establishes the circumstances in which and IIC must be provided. All that subsection 145(1) does is to confer a discretion on the ACA to require presentation of IICs which make the statement required by the section 266A Determination – that the accredited person is satisfied that operation of a device will not cause unacceptable level of interference as set out in the relevant Determination made under section 145(4).

26. The requirement to provide an IIC arises out of an ACA policy to that effect, and that policy is applied in the exercise of the discretion under subsection 145(1). The ACA has always been able to waive compliance with that policy, and will always be able to do so unless the legislation is amended to compel the provision of an IIC. It is by waiving that policy requirement, ie by exercising its discretion under subsection 145(1) that the ACA has facilitated the registration of devices without an IIC.

27. Having regard then to the wording of section 145, the role of Determinations made for subsection 145(4) and the legislative scheme as a whole, it is arguable that in making such a Determination the ACA is merely adopting a policy as to the issues on which it requires that it be satisfied before it will register the details of a device. On this view, the making of an amending Determination to give effect to the ACA's proposed changes to device registration procedures would be an administrative act. This view is supported by the fact that the 1992 Radiocommunications Bill contained an additional subclause 145(5) which provided that a Determination of unacceptable interference was a disallowable instrument. The disallowance provision was removed on amendment. The legislative history of the provision therefore strongly suggests that the view of the Parliament was that such Determinations were not legislative in character, but rather administrative.

28. Accordingly, it appears that both the making of the section 145 Determination and the Guidelines could be challenged under the ADJR Act, the grounds for potential challenge being set out at paragraphs 31-86 below.

29. Alternatively it might be argued that, in the context of the Act and the arrangements for the price-based allocation of licences, the making of a section 145 Determination is one which indirectly affects the rights, interests and expectations of all spectrum licensees, and so is legislative in nature. It may also be argued that the amendment of the Determination would have the effect of changing a rule of conduct, in that an accredited person would then have to issue IICs to a different effect.

30. In practice, of course, if the making of section 145 Determinations is not administrative, it will be legislative. If so, the making of such a Determination would arguably be open to challenge on the grounds that it would effect the acquisition of property other than on just terms, contrary to the prohibition in placitum 51(xxxi) of the Constitution. As the executive power of the Commonwealth does not, broadly speaking, exceed its legislative power, any administrative decisions of the ACA in implementing its proposed reforms that would have the effect of such an acquisition would be similarly open to challenge. The issue of the Constitutional validity of the ACA's proposed reforms is dealt with at paragraphs 87-101 below

Grounds for Judicial Review of the ACA's Proposed Reforms

31. This section addresses the potential grounds for challenge to administrative decisions of the ACA to implement its proposed reforms and, adopting the terminology of the RSC Paper, deals first with the issues relating to 'Proposed Amendments 1 and 2', then those affecting 'Proposals 2a and 2b'.

Proposed Amendment 1 – Require all applications to register a device under a spectrum licence to include a certification under section 145(3) from an accredited person

32. The ACA had regard to two issues in deciding whether to implement this proposal:
(a) the confusion apparently felt by some APs at the fact that they must provide an IIC when registering device details in reliance on the current technical framework, but that such a certificate is not required if the application is made:
    (i) in reliance on an alternative assessment methodology established by the AP; or
    (ii) to give effect to an agreement with any affected spectrum licensee to waive all or part of its right to protection under the technical framework; and
(b) the need to 'clarify' the current relationship and sharing of risk between accredited persons and licensees.

33. There must be considerable doubt whether the first issue provides sufficient justification for the decision of the ACA (see the article 'Proposed changes to Accreditation Procedures no Credit to the ACA', a copy of which is available from www.baileydixon.com.au). However, the fact that a decision may represent doubtful policy does not provide a ground for challenge to the decision.

34. The second issue referred to in the RSC paper in this context relates to certain assertions made by the ACA in considering Proposed Amendment 2 concerning the legal impact of IICs, and the protection from liability to spectrum licensees that the issue of such certificates allegedly provides to accredited persons. This second issue is dealt with in detail in relation to Proposed Amendment 2 in paragraphs 47-63 below. To the extent that the ACA relied on this issue in reaching its decision on Proposed Amendment 1, its decision on that amendment is open to challenge on the same grounds as Proposed Amendment 2 (see below).

Proposed Amendment 2 – To facilitate APs to use their own methodologies when certifying devices for registration

35. When considering whether to act to give effect to proposed Amendment 2, the ACA had regard to two issues:
(a) an incorrect characterisation of the role and purpose of the device boundary criterion; and
(b) the view that devices registered without an IIC present a greater legal risk to accredited persons than those registered with an IIC.

The impact on the validity of decisions made by the ACA in having regard to those issues is dealt with in paragraphs 36-46 and 47-63 below respectively.

(a) Incorrect characterisation of the role and purpose of the device boundary criterion

36. Unless registering devices on the basis of 'guard space' or a spectrum sharing agreement, the ACA will not register the details of a device for operation of transmitters under a spectrum licence unless it has been presented with an IIC in relation to the operation of the device. An IIC must state that operation of the device under the licence for which the transmitter is to be registered will not cause an unacceptable level of interference as set out in relevant section 145 Determination. The various Determinations made under section 145 for spectrum licensed bands define unacceptable interference to mean any interference that arises out of the operation of a transmitter in certain circumstances.

37. Under the current legislation, when accredited persons issue an IIC they certify that if the transmitter referred to in the certificate is operated in accordance with the device registration details which the certificate accompanies, the core conditions of the spectrum licence as to emissions outside the band and geographic area will be complied with. In addition, and depending on the band in which the transmitter is to be operated, accredited persons also certify that:

(a) the horizontally radiated power of the transmitter will be contained within a specified parameter (500 MHz, 800 MHz, 1800 MHz and 2 GHz bands); and/or
(b) the effective antenna height for the transmitter will be contained within specified limits (800 MHz, 1800 MHz, 2 GHz and 3.4 GHz Bands); and/or
(c) the transmitter will not be operated on a balloon or airship (3.4 GHz Band); and/or
(d) that it will be possible to calculate the effective antenna height of the antenna (28/31 GHz Bands); and/or
(e) the conditions in Schedule 4 of the licence will be complied with (2302-2304 Band); and/or
(f) the device boundary of the transmitter will not lie outside the geographic area of the licence (all bands other than the 28/31 GHz Band and the 2302-2304 Band).

(For details, see the Determinations made for section 145(4) for each spectrum licensed band.)

38. When the Productivity Commission (PC) reviewed the operation of the Radiocommunications Acts in 2001-2002, it received some comments on the appropriateness of the last of these requirements, which it referred to as the 'device boundary construct'. Some commentators felt that the construct was of no value. Others considered that it was a particularly useful tool in controlling interference. For some reason that is not readily apparent, the PC came to believe that the device boundary construct is the sole method by which an accredited person can demonstrate compliance with the core conditions of a licence (see the discussion under the heading Interference Impact Certificates at pages 208-211 of the PC's final report). That it reached this conclusion is clear from the following passage of the PC's description of the 'device boundary' debate in its final report.

> *'Evidence presented to the Commission suggests that some inquiry participants considered the ACA's device boundary construct to be a useful means of ensuring compliance with spectrum licence core conditions. However, it may not be the only means of doing so. If licensees can demonstrate that they meet licence core conditions using other methodologies, they should be able to do so' (emphasis added).*

The PC had accepted that registration of compliance with core conditions is an essential component of the spectrum licensing framework, and therefore proceeded to make its recommendation 9.1 that:

> *'Spectrum licensees should be required to certify compliance with core conditions when registering devices. However, the requirement that devices comply with the device boundary as set out in the relevant Determinations under section 145 of the Radiocommunications Act 1992 should not be mandatory'.*

39. Unfortunately, the PC seems to have misunderstood a number of important issues here. Firstly, compliance with the device boundary construct is not and never has been the sole mandatory method of

demonstrating that licence core conditions have been met. On the contrary, not only does the device boundary criterion have another function altogether, but it has also always been possible for accredited persons to demonstrate compliance with those conditions using other methodologies. Secondly, compliance with the device boundary does not ensure compliance with the core conditions. Thirdly, when issuing IICs accredited persons certify not only in relation to the core conditions of a spectrum licence, but also in relation to all the other factors that are defined as constituting unacceptable interference (see paragraph 37 above).

40. It is far from clear why the ACA allowed the PC to come to the conclusion that the device boundary is the sole method of demonstrating compliance with the core conditions. The error in characterisation had already been made by the time the PC came to issue its draft Report on which the ACA commented. However, the ACA apparently did nothing to clear up the misunderstanding. There is nothing in any of the ACA's submissions to the PC on the issue, neither was anything said on the subject by those who appeared on behalf of the ACA at the PC's hearings. It should be noted, however, that the issue was not raised directly or indirectly in questions by the Commissioners.

41. The ACA should be familiar with its own legislation and a cursory examination of the structure of the section 145 Determinations, such as that in paragraph 37 above, shows that the device boundary is not the sole method of demonstrating compliance with the core conditions. There is even a signpost as to the true nature of the device boundary in the note in the section 145 Determination for the 28/31 GHz band. That note points out that the device boundary is really only relevant when the levels of emissions into receivers in adjacent spectrum licences are strongly influenced by the effective antenna heights of transmitters. In other words, it is clear from the Determination itself that the device boundary is concerned with managing interference into receivers with certain deployment characteristics, and not compliance with the core conditions. Similarly, the construct is altogether missing from the section 145 Determination for the 2302-2304 Band. If the device boundary construct is the 'weapon of choice' of the ACA for establishing compliance with the core conditions, it should surely have been present in both.

42. The misunderstanding could have been simply cleared up by the ACA drawing the PC's attention to the relevant passages in the ACA's own descriptions of the technical frameworks for the various spectrum licensed bands in the 'Technical Framework' chapters of the Information Memorandums made available to prospective spectrum licensees. Those documents make it abundantly clear that the device boundary construct is not directly related to compliance with core conditions. For example, the following passage appears in Chapter 5 of the Information Memorandum for the 3.4 GHz Band:

> *'Before registering a device a licensee or accredited person must,* ***in addition to checking that the core conditions are maintained****, calculate the device boundary of the transmitter in accordance with the relevant Determination made by the ACA under s.145 of the Act' (emphasis added).*

43. It is difficult to imagine a clearer statement of the fact that the device boundary is **not** the method mandated by the ACA of verifying that the core conditions of a licence have been met. The Information Memorandum also indicates that the function of the device boundary is to require that the emission levels from a spectrum licensed transmitter be contained within the 'typical sensitivity that will be achieved by receivers in adjacent geographic areas'. If this evidence of the true nature of the device boundary were not enough, the characterization of the device boundary as a means of managing interference into certain receivers was also supported in submissions put to the PC by the person who actually devised the device boundary concept!

44. It was pointed out in the FuturePace Solutions submission to the PC that an accredited person can, where appropriate, use the device boundary concept as a tool in determining whether the core conditions are met. Nevertheless, the fact that the device boundary falls within the geographic area of a spectrum

licence does **not** necessarily mean that the core conditions of the licence are met. The PC's recommendation is therefore based on a partial, if not total misunderstanding of the role of the device boundary construct, and also the operation of the legislation.

45. Notwithstanding that the ACA should be well aware of this fundamental error underlying recommendation 9.1, it has nevertheless seized on that recommendation as the pretext for reviewing the system of device registration. Furthermore, the ACA expressly indicated in the paper presented to the Radiocommunications Steering Committee which approved the proposed reforms to the device registration procedures that those 'proposed changes are in response to….the Productivity Commission's…2002 Radiocommunications Inquiry Report'. The paper then went on to set out recommendation 9.1 *verbatim*. The ACA, in reaching its decision to amend the Guidelines, therefore clearly had regard to the view that:

(a) compliance with the device boundary ensures compliance with the core conditions; and
(b) the device boundary was the sole method of demonstrating compliance with the core conditions.

46. As illustrated above, those views are completely incorrect. Accordingly, in having regard to those views the ACA has necessarily had regard to irrelevant considerations.

(b) Devices registered without an IIC present a greater legal risk to accredited persons, whereas devices which are correctly registered with an IIC are 'legally deemed not to cause unacceptable interference regardless of what interference they may actually cause'

47. There would seem to be absolutely no support whatsoever in the Act, or in any instrument made by the ACA under the Act, for either of these views, and in having regard to them the ACA has quite clearly had regard to irrelevant considerations. The reasons for this view are set out in the following paragraphs 48-62.

48. Section 143 requires the ACA to maintain the Register of Radiocommunications Licences ('the Register') which is to contain, amongst other things, certain information about spectrum licences and licensees, and also certain information about 'devices that are operated under spectrum licences' (see section 144). The ACA can make Determinations about the information about spectrum licences that must be included in the Register (subsection 144(1)). The ACA can also include in the Register any other information that it thinks necessary or convenient (subsection 144(2)). The ACA has made a Determination for subsection 144(1) setting out the details about spectrum licences that must be included in the Register (the *Radiocommunications (Register of Radiocommunications Licences) Determination 1997*).

49. Section 69 of the Act relevantly provides:

> ***69*** *Conditions about registration of radiocommunications transmitters*
> *(1) A spectrum licence must include a condition that radiocommunications transmitters not be operated under the licence unless the requirements of the ACA under Part 3.5 for registration of the transmitter under that Part have been met.*

Spectrum licences contain a condition to give effect to section 69 in the following terms:

> *3. The licensee must not operate a transmitter under this licence unless:*
> *(a) the transmitter has been exempted from the registration requirements under clause 4, or:*
> *(b) both:*
> *(i) the requirements of the ACA under Part 3.5 of the Act relating to registration of the transmitter have been met; and*
> *(ii) the transmitter complies with the details about it that have been entered in the Register.*

The effect of section 69 and the licence condition is that if a licensee operates a transmitter in circumstances where the register does not contains all the information required by both:
(a) paragraphs 144(a) and (b) of the Act; and
(b) a Determination made for paragraphs 144(c) to (e) of the Act;
the licensee will have breached a condition of the spectrum licence.

50. Once presented with the details required by section 143 and the section 144 Determination, the ACA would apparently be obliged to register certain details if it were not for the limited discretion conferred on the ACA by section 145(1). The ACA does not appear to have any discretion to refuse registration of the details required by paragraphs 144(1)(a) – (d). The ACA can exercise that discretion 'if the ACA is satisfied that operation of the transmitter could cause an unacceptable level of interference to the operation of other radiocommunications devices under that or any other spectrum licence or any other licence'.

51. The intention of the Parliament in enacting these provisions was apparently that 'spectrum licensees will have considerable freedom to change how they use the spectrum, for what purposes and with what equipment' (see the Explanatory Memorandum to the Radiocommunications Bill 1992 at Part 3.5). That policy intent would have been thwarted if the ACA reviewed every device to establish whether or not it might cause unacceptable interference, the accreditation of the non-government engineers who present IICs being established 'to speed technical changes' (see the Explanatory Memorandum in relation to the objects of the Act'). Accordingly, subsection 145(3) allows the ACA to require that, before it registers the details of a device, a certificate be provided by an accredited person 'stating that operation of the device under the licence satisfies any conditions that are required to be satisfied, in relation to the issue of such a certificate, under a Determination made under section 266A'. This removed the involvement of the ACA in assessing the correctness of any proposed operation.

52. By virtue of section 5 of the *Radiocommunications (section 145(3) Certificates) Determination 2000*, all certificates issued by accredited persons in relation to spectrum licensed devices must state that the operation of the device in question will not cause an unacceptable level of interference as set out in the section 145 Determination for the relevant band. The ACA is able to give meaning to the expression 'unacceptable interference' by making a Determination under subsection 145(4). It has made a number of Determinations for this purpose, each of which defines unacceptable interference to mean the operation of a device in a certain manner.

53. The question then arises of just what an accredited person does when they issue an IIC for the purposes of section 145(3). The actual statement provided by accredited persons for this purpose is as follows:

> *'I am accredited under s. 263 of the Radiocommunications Act 1992 ('the Act') to present certificates to the ACA for the purposes of s. 145(3) of the Act in relation to the registration of transmitters to be operated under spectrum licences. Acting in accordance with the conditions of that accreditation, I CERTIFY THAT operation of the device(s) in Annexures (to be specified) of this application under the licence will not cause an unacceptable level of interference to the operation of other radiocommunications device(s) under the licence or any other spectrum licence or any other licence*'.

The statement recites the information necessary for the ACA to be able to rely upon it, namely that the person making the statement is appropriately accredited, and that in giving the certificate the person is acting in accordance with the conditions of that accreditation. The operative words are derived directly from section 5 of the 5 of the *Radiocommunications (section 145(3) Certificates) Determination 2000*.

54. The Macquarie Dictionary gives the following meaning to the word 'certificate':

A writing on paper certifying to the truth of something or to status, qualifications, privileges etc'.

The Dictionary in turn gives the following as the primary definition of the verb 'certify':

'to guarantee as certain; give reliable information of'.

The primary definition of the word 'guarantee' given by the Dictionary is not relevant here; but the second definition is relevantly as follows.

'*A promise or assurance….that something is of a specified quality*'.

55. Accordingly, it can be seen that what the Act and the Determinations made under it require of accredited persons is that they provide the ACA with written statements containing promises or assurances that the operation of devices will not cause unacceptable interference within the meaning of the section 145(4) Determinations. This is entirely appropriate given the probabilistic nature of assessments of interference, and in issuing an IIC an accredited person does no more than make a positive declaration, intended to give confidence to the ACA, that unacceptable interference (as determined) will not arise.

56. As mentioned above, there is an industry practice under which accredited persons issue IICs for devices without having conducted the compatibility checks established by the Guidelines. No doubt they have advised the relevant spectrum licensees of the risks of doing so, and the spectrum licensees have decided that they will bear the risk of any changes to their networks required because their operation causes interference that would fail the compatibility checks. A failure to meet the compatibility checks contained in the Guidelines, as the ACA's own documentation states, may be the cause of regulatory action because that interference is, for want of a better term, harmful. Prudent accredited persons and spectrum licensees will also, no doubt, have ensured that the issues, including liability, are appropriately dealt with in their contractual arrangements.

57. Clearly, therefore, an accredited person may incur liability to a spectrum licensee for the occurrence of interference caused by transmitters registered by means of an IIC. An accredited person may similarly incur liability to a spectrum licensee in respect of interference caused by transmitters that are registered without an IIC. The liability of an accredited person not does not depend in any way on whether or not a IIC happens to be issued in relation to the registration of any particular device. The occasion for accredited persons to incur liability to spectrum licensees would normally be the operation of a device in such a manner that it gives rise to interference from which another licensee may claim protection, either because the other licensee is a spectrum licensee whose protection rights have been breached, or because the other licensee is one with whose services the accredited person has failed to properly co-ordinate. A spectrum licensee may incur loss and damage, for example, because of the need to relocate or retune transmitters.

58. The nature and extent of any liability of the accredited persons will depend largely on their contractual arrangements. For example, assume that an AP contracts only to perform such services as are necessary for the registration of devices with an IIC, but does not advise its client that the operation of the device may nevertheless fail the compatibility checks with apparatus licensed services. The devices are registered, and cause interference to apparatus licensed services. The ACA requires the spectrum licensee to properly coordinate with those apparatus licensed services and the spectrum licensee incurs losses. The spectrum licensee did not know what the role of the compatibility checks were, and advised the AP that it was relying entirely on the APs advice. The AP would almost certainly be under a duty to have

advised its client of the potential risk. As the AP failed to do so, the AP would be liable for the reasonably foreseeable consequences of that failure. That liability arises even though an IIC has been issued.

59. It can be seen, therefore, that the liability of an accredited person to a spectrum licensee does not depend at all on whether the accredited person causes a device to be registered by giving the ACA a 'certificate' about unacceptable interference, or whether the accredited person makes a statement to the ACA either about the use of 'internal guard space', or about the existence of an agreement with another spectrum licensee. The nature and extent of any liability is determined by the legal relationship between the AP and the spectrum licensee, contractual or otherwise, the nature of the work that the AP has agreed to perform, and the manner in which the AP acts. The administrative process by which an accredited person achieves registration of a device is essentially irrelevant to the question of liability.

60. The only way in which the issue of an IIC could possibly affect the potential liability of an accredited person to its client spectrum licensee would be if the issue of the IIC in some way results in other spectrum licensees being unable to claim protection from any interference caused by the devices registered in reliance upon it. The RSC paper contains an assertion that this the case. Unfortunately, there is nothing whatsoever in the Act, or in any other instrument made under it, that would prevent the ACA from taking action to require a spectrum licensee to cease causing interference if it transpired that the interference was unacceptable interference within the meaning of the relevant section 145(4) Determination. Nor does any provision of the Act, or of any instrument made under the Act, operate on an IIC so as to 'deem' any interference that may ever occur as a result of the operation of a device referred to in that certificate to be either 'acceptable' or 'non-harmful'. This view has also been confirmed by two major suppliers of accredited person services, including one who provides device registration services, both of whom expressed the opinion that the ACA's proposed changes would make no difference at all to the issue of their liability.

61. It should also be noted that if the ACA is in fact right about the impact on the liability of spectrum licensees and accredited persons of the issue of an IIC, the implementation of a requirement to provide an IIC in relation to devices assessed in accordance with the Guidelines would deprive spectrum licensees of a right to protection from services that have not been coordinated in accordance with the Guidelines. The ACA has quite explicity stated in the Information Memorandums that it may take action against a spectrum licensee in relation to out-of-band interference that a spectrum licensee might cause to through a failure to properly coordinate its services in accordance with the relevant Guidelines with those of other licensees. Some Guidelines deal with the coordination of services between spectrum licensees. If the effect of an IIC is, as the ACA alleges, to 'deem' all interference caused by devices registered under it to be 'acceptable', spectrum licensees would quite clearly have lost a right to protection.

62. To the extent, therefore, that the ACA has had regard to the statements in the RSC paper to the effect that devices registered without an IIC can be found to cause unacceptable interference, whereas devices which have been correctly registered with an IIC are legally deemed not to cause unacceptable interference, regardless of what interference they may actually cause, the ACA has quite clearly had regard to irrelevant considerations.

63. The statement also raises some serious commercial considerations. If the ACA maintains its position, the extent of a spectrum licensee's protection rights would depend entirely on the competence of an accredited person in assessing whether or not operation of a device in a certain manner would meet the requirements of the section 145 Determination. Such an outcome is nonsensical in a commercial sense, and the ACA's position therefore seems to have little to recommend it as a proposition of either law or policy.

Proposal 2b – Allow the option (Option D in Attachment 4 to the RSC paper) to enable APs to have their own methodologies formally endorsed by the ACA if they wish their process to have the same legal status as the device boundary procedure – that is to be deemed not to cause unacceptable interference in terms of relevant section 145(4) determination (interference rules) for the band

64. In discussing Option D in the RSC paper the ACA has indicated that alternative methodologies would 'normally be assessed through the work of a technical liaison group comprised of both ACA and industry representatives, similar to the process by which technical frameworks are initially formulated for spectrum licensed bands. Such processes are both resource intensive and time consuming. However, the RSC paper does not contain any statement concerning the potential financial impact on the industry by implementing such a proposal. Indeed, it is far from clear that the ACA has even made any estimate of the cost to industry of this, or of any other of its proposed reforms.

65. The cost to industry of regulatory changes is clearly a relevant factor in the decision making process, if only to give effect to the object in paragraph 3(g) of the Act of providing a regulatory environment that maximises opportunities for the Australian communications industry in domestic and international market. The opportunities for the Australian communications industry can hardly be maximised if it is subject to unnecessary costs. Furthermore, the cost of the process was alluded to in representations made at officer level to the ACA on the proposed reforms. Accordingly, any decision of the ACA in relation to this Option, and indeed any other Option or aspect of the proposed reforms, is open to challenge on the ground of the ACA's failure to have regard to the financial cost to industry.

Impact of ACA's Proposed Reforms on Existing Spectrum Access Rights

66. The ACA's analysis of what it believes to be the existing device registration scheme is described in the RSC paper, and is shown diagrammatically in Attachment 3 to that document. These analyses appear, on their face, to reflect a failure to understand how the technical framework and legislative instruments combine to establish the spectrum access rights that spectrum licensees acquire at auction. To understand how the existing spectrum access rights of spectrum licensees will be affected by the proposals, it is first necessary to understand what the current registration options actually are, and precisely how the proposed changes will change those device registration procedures.

67. It is clear from the discussion above under the heading '*Incorrect characterisation of the role and purpose of the device boundary criterion*' (see paragraphs 36-46 above), that the current Option A for device registration is not as the ACA represents it, merely 'Device Boundary Calculation'. If the ACA were following the regime it originally established, Option A should be described as 'Compliance with all requirements of existing section 145 Determinations'.

68. Similarly, an accurate description of Option B under the regime originally established by the ACA would be 'Any other methodology devised by an Accredited Person which shows that:
(a) the core conditions will be complied with; and
(b) equivalent protection to that established by all other provisions of the section 145 Determination will be afforded to all other spectrum licensees;
which may, but need not be, established by reference to the Guidelines'.

69. A more accurate description of the current Option C would be 'Spectrum sharing agreement with all potentially affected spectrum licensees whose licences were issued subject to the same technical regime, and where there is no potentially affected spectrum licensee, the ACA as the notional spectrum licensee'. The fact that a licensee is adjacent in either spectrum or geographic terms is essentially irrelevant to the question their spectrum access rights. The current technical frameworks and registration requirements do two things. Firstly, they establish the rights as against each other, of all spectrum licensees who acquire

their licences under the same price-based allocation process and subject to the same framework. Secondly, they ensure that where the activities of a spectrum licensee may impact on unencumbered spectrum, the spectrum licensee is constrained in those activities by being required to enter into agreements with the ACA as if the ACA were the holder of a similar spectrum licence. In this way a spectrum licensee cannot 'devalue' unencumbered spectrum.

70. To the extent, therefore, that the ACA has had regard to such inaccurate representations of the current device registration processes, the ACA has had regard to irrelevant considerations.

71. Turning now to the impact of the proposed reforms on the spectrum access rights of existing spectrum licensees, the ACA indicates in its written description of its proposals that there will be three routes to registration requiring certification that the accredited person has followed:
(a) the device boundary procedure; or
(b) a methodology using the guard space provisions set out in the Guidelines which provides equivalent protection to the device boundary procedure; or
(c) a third party agreement with the ACA or another licensee to operate in their spectrum space.

72, The diagrammatic representation of the ACA's proposals shows not three, but four routes to registration:
(a) the device boundary procedure (Option A);
(b) an alternative ACA approved methodology (Proposed Option D);
(c) a methodology for interference management developed by the accredited person and following clarified principles to be set out in the Guidelines (Proposed Option B);
(d) agreement with adjacent licensees (Option C).

Option A

73. The ACA states in its proposal summary that the proposed changes to the registration scheme will 'not alter the basic interference protection levels defined within the existing technical frameworks established for spectrum licensed bands'. However, as can be seen from the discussion in paragraphs 36-46 above it is entirely incorrect to equate the device boundary procedure with achieving levels of protection adequate to protect existing spectrum access rights. If, therefore, the ACA were to give effect to Option A by amending the various legal instruments that provide for registration *etc* to allow registration solely on the basis of certification that the device boundary criterion has been met, there would necessarily be a diminution in the spectrum access rights of existing spectrum licensees.

74. That diminution would arise because at present protection is currently afforded against interference which arises from any failure to comply with <u>all</u> aspects of the section 145 Determinations. Under the ACA's proposal, however, a spectrum licensee would be able to operate a device which would not cause unacceptable interference because it complies solely with the device boundary criterion. The protection afforded to spectrum licensees by certification against the other aspects of the section 145 Determinations, and even against the core licence conditions would be lost. This is best illustrated by an example.

75. Assume 2 spectrum licensees X and Y. Under the current procedures, a device can only be operated in accordance with registered device details intended to ensure that <u>all</u> the current requirements of the current section 145 Determinations will be met. If interference arises because <u>any</u> of those current section 145 Determination requirements are breached, the interference will be unacceptable interference, and Y can:
(a) if X is operating other than in accordance with the conditions of the spectrum licence and/or the registered details, bring an action against the spectrum licensee under section 50; or

(b) if X is operating the device within the registered device details, but nevertheless giving rise to unacceptable interference as presently defined under the section 145 Determination, claim protection from that interference, triggering regulatory action on the part of the ACA.

76. Under the ACA's Proposal A, it will be possible for X to have a device registered for operation under X's spectrum licence if operation in accordance with the registered details would not cause the device boundary criterion to be breached. If the device is operated in accordance with those registered device details, and interference to Y's services arises in circumstances where any of the other current section 145 Determination requirements are not met, Y will:

(a) have no right of action against X, because X will be operating in accordance with the registered details and the requirements of X's licence; and
(b) will be unable to claim protection from the ACA, because X will no longer be causing unacceptable interference as defined by the section 145 Determination.

77. In other words, X will have lost its right to protection from interference arising through the operation of a device in circumstances in which, prior to implementation of the ACA's Proposed Option A, that operation would give rise to unacceptable interference. Accordingly, the substantive effect of the implementation of the ACA's Option A is to:

(a) remove those existing rights to protection from X; and
(b) transfer to Y a correlative right to interfere with X's services.

Option B

78. Proposed Option B is described by the ACA as allowing a spectrum licensee to issue a certificate on the basis of methodologies developed by an accredited person having regard to 'internal guard space principles and parameters clarified on a band-by-band basis to facilitate APs using their own methodologies for interference management'. The Option as described in the ACA paper refers only to the Guidelines incorporating principles and parameters in relation to guard space. In practice under the current regime, however, the ACA verifies the alternative methodologies developed by accredited persons as regards the Guidelines before accepting applications for the registration of devices. In doing so, the ACA ensures that the operation of a device registered following that methodology will not lead to any diminution in the level of protection that is afforded to spectrum licensees under the section 145 Determination. Accordingly, although the certification relates only to the use of guard space, the existing spectrum access rights of other spectrum licensees are protected.

79. Under the current system registration of a device confers a right on other licensees to protection if the spectrum licensee:

(a) operates in a way that is not in accordance with the registered device details; or
(b) causes unacceptable interference because, even though the device is registered in accordance with those registered details, unacceptable interference arises.

If proposed Option B were implemented the section 145 Determination can no longer be used to define unacceptable interference, because the 'determination' of a matter requires that it be definite. In other words, an IIC could only be issued to the effect that the device details to be registered have been derived in accordance with the Guidelines.

80. It Option B were implemented, and spectrum licensee X were to operate a device in accordance with device registration details established by an accredited person having regard to the revised Guidelines, and the device were nevertheless to cause interference to the service of spectrum licensee Y, and that interference would presently be unacceptable, there is nothing that Y would be able do. The interference caused by X is no longer 'unacceptable' within the meaning of the Act, and the ACA is apparently under

no obligation to do anything. Y also has no rights against X under section 50 of the Act, because the device is being operated in accordance with its registered details.

81. The only way in which this removal of rights could be avoided would be if the Guidelines were to state that the operation of the device must not give rise to a level of interference greater than that previously defined as unacceptable. However, this would bring the entire process full circle, and make the implementation of the option otiose, as the original levels of protection would be maintained, requiring compliance with all aspects of the existing section 145 Determination, and the device boundary criterion.

Option C

82. As discussed above, Option C as set out in the ACA's proposal summary does not accurately describe the current regime, which requires certification in the following terms:

> *'All licensees who, in my opinion, may be affected by the operation of the devices, in accordance with the details in the Annexures (PLEASE SPECIFY) have agreed to the devices being operated in that way in the agreement at Attachment (PLEASE SPECIFY) or in a previously supplied agreement, reference shown'.*

The certification therefore refers to all spectrum licensees whose services might potentially be affected by the operation of a device to be registered.

83. The ACA's proposal is to allow registration on presentation of a certificate that an agreement with 'adjacent' licensees. If this were implemented there would necessarily be an immediate reduction in the rights of all spectrum licensees whose services might potentially be affected by the proposed service, and whose spectrum licences are not adjacent in geographic or spectrum terms to the spectrum licence for which the device is to be registered. In other words, Option C removes the existing right of a spectrum licensee to refuse to agree to, and so 'veto' the operation of a device in 'non-adjacent' spectrum, in a manner that would cause unacceptable interference as currently defined in the relevant section 145 Determination to the services of the spectrum licensee.

Option D

84. The problem with proposed Option D is that, if implemented, there would no longer be any single definition of the protection rights that a spectrum licensee might obtain. At present a spectrum licensee acquires at auction rights to both cause and receive protection from a defined level of interference. That level of interference is determined to be 'unacceptable interference' under section 145(4). The ACA allows devices to be registered in circumstances where certification against the requirements of the section 145 Determination is not provided. Before doing so, the ACA verifies whether the proposed arrangements will protect the rights of spectrum licensees to the same degree as would compliance with the section 145 Determination. As mentioned above, if operation in accordance with registered details nevertheless causes unacceptable interference, the spectrum licensee can claim protection from that interference. Under the ACA's proposal to introduce Option D, however, there may be two or more definitions of unacceptable interference which may be inconsistent.

85. This issue was drawn to the attention of the ACA during consultation, and the RSC paper acknowledges that inconsistent definitions of unacceptable interference 'would represent a possible degradation of the value of the spectrum licence asset and a problem for interference resolution'. The RSC paper then dismisses the issue, saying 'We do not believe this problem would eventuate because the issue would be dealt with at the level of technical liaison group considerations and methodologies that created such problems would not be supported'. However, there is no guarantee of this occurring. Were

the ACA to register devices in a manner which led to the protection rights of spectrum licensees being reduced, there would be a consequent increase in the transmission rights of other spectrum licensees.

86. The proposal also raises some commercial issues. Whether or not the ACA persists in its incorrect view that a registered device is deemed never to cause unacceptable interference, Proposed Option D leaves open the possibility that a spectrum licensee, having planned a network to account for one level of interference, may later suffer increased levels of interference and be able to do nothing about it. (Indeed, if the ACA is correct in its assertions about the 'deeming' effect of IICs, that situation is inevitable.) Furthermore, if spectrum licensees cannot rely on the ACA enforcing their right to protection against unacceptable interference as defined in the original section 145 Determination, they will have absolutely no certainty as to what they have purchased at the time of any future allocation.

Constitutional Invalidity of Proposed Reforms

87. As discussed above, a licence confers more than just a right to transmit. It also confers a correlative right to protection from interference from services operated by others. There is no doubt that the ACA recognizes that this right to protection may be 'traded' by a spectrum licensee, who can agree to accept higher levels of interference from another spectrum licensee. As such the right to protection conferred by a spectrum licence may constitute property for the purposes of placitum 51(xxxi) of the Constitution. That provision provides a Constitutional guarantee against the acquisition of property from any person for a purpose of the Commonwealth other than on just terms.

88. The proposed reforms by the ACA make no provision for the payment of compensation to a licensee for the removal of the licensee's rights to protection. Accordingly it is necessary to determine whether the reforms would breach the Constitutional guarantee because:

- the right to protection conferred by a spectrum licence constitutes 'property' within the meaning of placitum 51(xxxi) of the Constitution
- the ACA's proposed reforms effect an 'acquisition' of those rights
- the protection rights are acquired for a purpose of the Commonwealth

89. It is well-established that the word 'property', in its context in placitum 51(xxxi), must be construed broadly: see *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J, 290 per Starke J, and 295 per McTiernan J; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172 per Mason CJ, 184 per Deane and Gaudron JJ and the cases cited (at footnotes 49 and 86 – 88). As these authorities show, 'property' in this context includes every species of valuable right and interest, including real and personal property, incorporeal hereditaments, and choses in action. Licences have also been held to constitute property for these purposes.

90. In his well known speech in National Provincial Bank Ltd v Ainsworth [1965] AC 1175, at 1247-1248, Lord Wilberforce said:

> *"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*".

A spectrum licence would appear to meet these requirements. However, it might be argued that the removal of a right to protection does not constitute an acquisition, but rather mere regulation (see *Nintendo Company Limited v Centronics Systems Pty Ltd & Ors* (1994) 181 CLR 134). On this view, the Act and the instruments establishing the protection and accreditation regimes would be characterized as laws that involve the adjustment between parties of competing rights, claims or obligations as regards radiocommunications, ie as laws with respect to the regulation of a particular area of activity.

91. Such a conclusion would appear to be supported by the views expressed by Deane and Gaudron JJ (see *Mutual Pools, supra* at 189-190) where the extinction of pool builders' claims to compensation from a fund amounted to an acquisition, but the legislation in question was held not breach the prohibition in section 51(xxxi) because it provided a means of resolving or adjusting the competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship.

92. However, the removal of the protection rights of spectrum licensees is not being undertaken by the ACA as a means of 'resolving or adjusting the competing claims, obligations or property rights of spectrum licensees as an incident of the regulation of their relationship. Instead, as the ACA has itself pointed out, the reforms of the device registration procedures are being introduced in in pursuit of the policy objective of improved participation by accredited persons in the market for device registration services. Regulation of the relationship between the spectrum licensees, and their relative rights and liabilities, could not in any way be described as the purpose of the proposed reforms.

93. The most recent case in which the diminution of statutory rights has been considered by the High Court in relation to placitum 51(xxxi) is *Smith v ANL Ltd* (2000) HCA 58. In their joint judgment Gaudron and Gummow JJ commented that questions of degree and substance rather than merely form are involved, and pointed to the fact that the legislation found to be invalid in *Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297* denied his right to recover damages, and deprived him of his right to full recovery of economic loss, but did not extinguish the whole of the rights comprising his common law cause of action. Similarly, in *Newcrest Mining WA Limited v The Commonwealth of Australia (1997) 190 CLR 513*, the law held to be invalid did not in terms extinguish Newcrest's mining tenements, but nevertheless effectively 'sterilised' them because it forbade any operations for the recovery of minerals. By contrast, in *Waterhouse v Minister for the Arts and Territories* a prohibition on the export of a painting left the owner free to retain, enjoy, display or otherwise make use of the painting. He was free to sell, mortgage or otherwise turn the painting to his advantage, subject to the requirement of an export permit if the owner or any other person desired to take it out of Australia. The law was therefore not held to constitute an acquisition.

94. In the ANL case *(supra)* Gaudron and Gummow JJ held that the law in question denied employees their otherwise existing rights to bring actions against their employers, and did so by imposing a procedural limitation on the commencement of actions. The judgment of their Honours, with whom Gleeson CJ agreed, contained the following important passage:

> *The right to bring the action without the defendant being in a position to plead a time bar is a significant and integral element of the cause of action itself. To impose the bar found in s 54 is to do more than impair the enjoyment of the property constituted by the chose in action. It does not attract reasoning of the kind in Waterhouse. Rather, the substance of the chose in action is impeached and a correlative and significant benefit is conferred upon the defendant.*

Similar views were expressed by Callinan J and Kirby J. Accordingly, it appears necessary to examine whether the particular right which has potentially been acquired, is a 'significant and integral element' of the bundle of rights comprising property. To answer this question it is necessary to look at the substance of the rights that together make up the property. Furthermore, it is necessary to examine whether the 'substance' of the right is impeached, and correlative benefits conferred on others.

95. As illustrated in paragraphs 4-13 above, a spectrum licence carries with it two essential rights – the right to transmit, and the correlative right to receive the transmitted signal *ie* a right to protection. Without being able to receive a signal using appropriate equipment, a right to transmit is simply meaningless. To paraphrase the reasoning of Gaudron and Gummow JJ, the right to protection is a significant and integral element of the property, the removal of which does more than impair the

enjoyment of the property constituted by the licence. The reality is that having planned a network, and expended potentially vast sums on its implementation, to reduce the level of protection below that which was assumed in the technical framework and held out by the ACA as the basis of future operations, does far more than leave a spectrum licensee with a slightly reduced ability to operate. Potentially it removes that ability for some considerable time until an appropriate technical solution is found, if one is available. If no financially viable technical solution is available, or if it cannot be implemented sufficiently quickly to prevent the 'leaching' of customers, the result commercially may be to render the licence unusable.

96. The importance of the reliance of spectrum licensees on the technical frameworks established by the ACA at the time of allocating spectrum is echoed in the words of Callinan J in the ANL case (*supra,* at 190). Having referred to the assumption that, when acting commercially, the Commonwealth 'will neither arbitrarily nor otherwise generally repudiate its obligations, however created, without compensation', his Honour continued:

> *'And the assumption to which I have referred has a close affinity with another assumption, that a responsible government will only unusually, and perhaps only in highly exigent circumstances act in such a way, retrospectively or otherwise, to take away something granted and owned, or lawfully enjoyed, and for which payment or consideration has been made or provided, or upon which effort or money has been expended'.*

Given that Gleeson CJ also agreed with the views of Justices Gaudron and Gummow, it would appear that a majority of the justice on the current High Court would be more likely than not to find that the reforms to the accreditation procedures proposed by the ACA would breach the Constitutional guarantee contained in placitum 51(xxxi). It should also be noted that whilst Hayne and McHugh JJ reached a different conclusion in the ANL case, that decision was based on the view that there was no acquisition of property because there was no 'legal or practical compulsion'.

97. The question of whether or not an acquisition can occur through extinguishment or reduction in a statutory right was also recently consider by the Federal Court in *ACT v Pinter* [2002] FCAFC 186. In that case Chief Justice Black noted that it is clear on High Court authority that not all statutory rights are inherently susceptible to variation so as to be capable of being acquired other than on just terms. His Honour concluded that the critical question is whether statutory rights are inherently defeasible, and in looking at the issue had regard to a number of issues as follows:

- the objects of the legislation
- the fact that ultimately all statutory rights are susceptible to modification
- the fact that a statutory rights is not inherently defeasible does not mean that the right may exist forever
- that elements of discretion in statutory rights must always be exercised according to law
- the question of whether the benefit of a right is obtained gratuitously
- the question of whether the rights in question are 'ephemeral or prone to ready variation' rather than stable and established
- whether there is a real value attached to the rights

98. The legislative scheme of the Act suggests that those rights, whatever they may be, are not 'ephemeral etc. Clearly, spectrum access rights are not acquired gratuitously, and there is a considerable value attached to them.

99. Furthermore, if spectrum access rights were inherently defeasible there would be no need for the conferral of resumption powers. While the powers in the Act to vary the instruments that establish the technical framework are not subject to an express requirement to provide compensation, it should be noted the purpose of the resumption provisions was to ensure that there would not be potentially

perpetual alienation of spectrum. To overcome this, it was only necessary to allow the Commonwealth the ability to re-allocate licences. It was not necessary to confer on the Commonwealth any power to reduce or diminish the content of the right to transmit and receive. Accordingly, the fact that the Act does not contain equivalent 'resumption' provisions empowering the ACA to reduce the content of spectrum access rights, does not mean that such rights are necessarily inherently defeasible. All it means is that there was no need to confer such powers in order to achieve the particular policy objective.

100. The very existence of the resumption provisions appears to confirm the view that spectrum access rights conferred by spectrum licences were intended to be indefeasible. The ACA is able to determine the extent of those rights prior to allocation, but is not able to reduce those rights once acquired at auction without compensation, except to the extent that the statutory framework which established them acknowledges this to be the case. For example, to the extent that a right to transmit may, in practice, encroach on the pre-existing rights of other licensees to protection in either spectrum licensed or apparatus licensed spectrum, that right might be modified by the ACA imposing appropriate conditions on a spectrum licence. However, that modification would take place within the original technical and statutory framework which establishes the transmission and protection rights of spectrum licensees.

101. The scheme of the Act is such that the spectrum access rights of spectrum licensees are clearly not inherently defeasible. Such rights may only be obtained through auction, tender or by payment of a negotiated or predetermined price. The Macquarie Dictionary relevantly defines 'auction' to mean a public sale at which property or goods are sold to the highest bidder, 'tender' to mean an 'offer', and 'price' to mean the sum or amount of money, or its equivalent, for which something is bought, sold or offered for sale. The Act therefore contemplates that prospective licensees will buy their spectrum access rights, and in the context of such a legislative scheme the subsequent unilateral alteration of the property so acquired is simply untenable. Accordingly, to the extent that they would result in the reduction of the rights of spectrum licensees to protection, and the conferral of correlative rights on other spectrum licensees, the actions of the ACA in giving effect to the proposed reforms of device registration would be invalid for contravention of section 51(xxxi) of the Constitution.

An article addressing the policy issues arising out of the ACA's proposed reforms is available here.

