

EXPLANATORY STATEMENT

Australian Communications and Media Authority Act 2005

Australian Communications and Media Authority (Modifications to Apparatus and Spectrum Licences Taxes) Direction 2020

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Authority

Section 14 of the *Australian Communications and Media Authority Act 2005* (the Act) enables the Minister for Communications, Cyber Safety and the Arts (the Minister) to direct the Australian Communications and Media Authority (ACMA), in writing, in relation to the performance of its functions and the exercise of its powers.

Under the *Radiocommunications (Receiver Licence Tax) Act 1983*, tax is imposed on the issue of a receiver licence and as applicable, each anniversary of the day the licence came into force (section 6). The amount of tax is determined in a written instrument made by the ACMA (section 7).

Under the *Radiocommunications (Transmitter Licence Tax) Act 1983* tax is imposed on the issue of a transmitter licence and as applicable, each anniversary of the day the licence came into force (section 6). The amount of tax is determined in a written instrument made by the ACMA (section 7).

Under subsection 7(1) of the *Radiocommunications (Spectrum Licence Tax) Act 1997*, the amount of tax in relation to a spectrum licence is the amount ascertained in accordance with a written determination made by the ACMA.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend or vary any such instrument.

Nothing in the *Australian Communications and Media Authority (Modifications to Apparatus and Spectrum Licences Taxes) Direction 2020* (the Direction) prevents the Australian Communications and Media Authority from exercising its powers in relation to the other amounts of tax imposed by these Acts.

The changes to the Spectrum Determination to be made by the ACMA as a result of this Direction are intended to be ongoing, but may be amended or revoked in the future depending on future decision by Government concerning funding of the Enhanced Electromagnetic Energy Program.

Purpose

The purpose of the Direction is to instruct the ACMA, in accordance with section 14 of the Act, to amend three radiocommunications (telecommunications) taxation determinations. This instruction will give effect to the Australian Government's decision of December 2019 to enhance both the activities and funding for the EME Program to better address contemporary research and communications needs regarding the regulation and safety of EME from telecommunications equipment.

This Direction reflects the Government's decision regarding the taxation arrangements for the Enhanced EME Program, and specifically requires the ACMA to amend:

- the *Radiocommunications (Transmitter Licence Tax) Determination 2015* (Transmitter Determination) and the *Radiocommunications (Receiver Licence Tax) Determination 2015* (Receiver Determination) so that the component of the tax payable in future financial years that is attributable to the Historic EME Program is removed in respect of all transmitter and receiver licences; and
- the *Radiocommunications (Spectrum Licence Tax) Determination 2014* (Spectrum Determination) so that a new annual tax component is payable by the defined spectrum licences in future years, beginning financial year 2020-21 and adjusted annually according to the target tax amount and indexation arrangements.

As a result of implementation of section 5 of the Direction by the ACMA, the historical EME component of the transmitter licence and receiver licence taxes would cease to be collected after 30 June 2020. This effectively means that the amount of the taxes payable by all holders of receiver and transmitter licences (apparatus licences) from 2020-21 and in future years would not include the EME component (the Direction does not prevent the ACMA from changing amounts of tax which it collects for other purposes).

The effect of the ACMA's implementation of the Direction in respect of the Spectrum Determination will be that a new EME component for the spectrum licence tax in respect of all designated spectrum licences would be introduced, effective from the 2020-21 financial year. The formula for the allocation of this tax between designated spectrum licences will be determined by the ACMA, following a consultation process, and included in the amended determination in a clear and unambiguous way.

The Direction provides an exemption to defined entities who hold a spectrum licence or where there are conditions on the licence relating to the use of spectrum. These exempted entities are those which hold, but cannot use, or are not using, the licence to provide a public telecommunications service for commercial purposes; for example, the Department of Defence, public transport services using communications systems for the safe operation of their services, and licences used for the purposes of the provision of a television outside broadcast service. These entities will not be liable to pay the EME tax component of the Radiocommunications Spectrum Licence Tax.

The revenue of \$2.6m p.a. over the next three financial years (2020-21 to 2022-23) and \$1.9m p.a. (indexed) from 2023-24 onwards comprising the new EME component will be used by the Australian Government to fund research, information provision and engagement activities into the health effects of electromagnetic energy from telecommunications facilities under the Enhanced Electromagnetic Energy Program. Information about the Enhanced EME Program can be found on the website of the Department of Infrastructure, Transport, Regional Development and Communications at <http://www.communications.gov.au/eme>.

Background

The Australian Government's Electromagnetic Energy (EME) Program provides for research, international engagement and public information concerning electromagnetic energy from telecommunications facilities. When established in 1997, it was decided that funding would be collected from transmitter licence and receiver licence holders. These licence holders vary ranging from telecommunications carriers through to amateur radio enthusiasts, local taxi services, local councils, and construction companies. Most of these licensees are not deploying national networks near people's homes or otherwise contributing to community concerns about the health effect of EME, which are the concerns that the EME program are seeking to address. Most apparatus licence holders currently pay an additional percentage as part of the current tax calculation, which is payable on issue of the particular receiver or transmitter licence and as applicable, on each anniversary of the day the licence came into force.

The Government has decided that the offset for the Enhanced EME Program should be directly collected from telecommunications companies through the existing spectrum licence tax arrangements and this approach is administratively efficient. The existing spectrum licence tax already collects (cost-recovery) funding for some of the ACMA's spectrum management-related costs. Carriers' commercial deployments of new and emerging technologies are causing the need for the Government to respond to community concerns about 5G and EME. The increases to the spectrum licence tax will fund activities under the Enhanced EME Program.

Spectrum licences are held by all the major telecommunications carriers (fixed-line and mobile) - as well as their subsidiaries - to deploy their networks. Most of the current spectrum licences are in place for the next decade until the late 2020s. Carriers that have successfully secured access to spectrum (such as through an auction) then pay an annual spectrum licence tax. This tax is currently calculated for all licences on 11 October each year, and payable within 60 days. The number and use of long term spectrum licences is expected to continue to increase over the next few years.

The ministerial power to give directions to the Australian Communications and Media Authority (ACMA) under section 14 of the Act includes a condition that the direction can only be of a general nature if it relates to the ACMA's broadcasting, content and datacasting functions; or the ACMA's powers relating to those functions in subsection 14(2). As the Direction does not relate to any of these functions, the condition set by subsection 14(2) does not apply. The Direction is also not subject to any statutory preconditions.

Consultation

The ACMA was consulted during all stages of the development of the Direction and the ACMA provided comment on drafts of the Direction. The final form of the Direction has largely incorporated the feedback received by the ACMA. In March 2020, a draft of the proposed Direction was provided to all current holders of spectrum licences, future spectrum licence holders Densesir and Airpsan, as well as the Australian Mobile and Telecommunications Association and Communications Alliance (being the key industry bodies representing telecommunications carriers). Spectrum licence holders have also been informed that the ACMA will undertake further consultations when amending the *Radiocommunications (Spectrum Licence Tax) Determination 2014*.

Key feedback on the draft Direction included:

- a) Exempted entities seeking to confirm that they would not be liable for the proposed new EME component of the spectrum licence tax.
- b) some stakeholders expressed a preference for the proposed new EME component of the spectrum licence tax to be paid by a broader group of licence holders.
- c) Clarification regarding the expected amount to be collected over the forward estimates period and a request for transparency on how the funding would be spent.
- d) Two minor drafting amendments.

The Department was able to resolve the minor drafting amendments and address the questions regarding liability and the value of the proposed taxation against the value of the Enhanced EME Program. The matter of liability for the new tax component was a decision of Government, and therefore cannot be resolved through drafting changes.

Regulatory Impact

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for this Direction (OBPR reference number 25404).

Further Details

Further details of the Direction are set out at [Attachment A](#).

The Direction is a legislative instrument for the purposes of the Legislation Act 2003. However, this instrument is not subject to disallowance, as it is a direction by a Minister to a body (see item 2 of the table in section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

Notes on sections

Section 1 provides that the name of the Direction is the *Australian Communications and Media Authority (Modifications to Apparatus and Spectrum Licences Taxes) Direction 2020*.

Section 2 provides that the Direction will commence on the day after it is registered on the Federal Register of Legislation.

Section 3 states the legislative authority for the Direction as being section 14 of the *Australian Communications and Media Authority Act 2005*.

Subsection 4(1) provides the interpretation of key terms used throughout the Direction.

Subsection 4(2) clarifies that apart from the matters specified in the Direction, the Direction is not intended to limit or prevent the ACMA in the future from varying the amount of Receiver Licence Tax, Spectrum Licence Tax or Transmitter Licence Tax on relevant licences for any other purpose.

Section 5 requires the ACMA to remove the Historical EME Component from the amounts of Transmitter Licence Tax and Receiver Licence Tax it has determined. Any transmitter licence or receiver licence subject to transmitter licence tax or receiver licence tax on or after 1 July 2020 will no longer have to pay the Historical EME Component as part of the tax. As a result of the Direction, only transmitter licences and receiver licences that were subject to the Historical EME Component will have their taxes reduced. Prices that do not include a Historical EME Component such as taxes that were introduced after the introduction of the EME component will not be reduced.

Subsection 6(1) requires the ACMA to amend the Spectrum Determination so that the amount of Spectrum Licence Tax to be collected from Designated Spectrum Licences includes a New EME Component (defined term) that is no more than the amount specified for each specified financial year, and collectively this is referred to as the “Combined Spectrum Tax EME Component” in section 6 of the Direction. The use of the term “no more than” enables the ACMA to calculate and bill the tax liability closest to the target amount without being in breach of the Direction, should the exact target figure not be collected. This term also provides certainty to liable entities that the EME tax component will not be increased without further consultation.

Subsection 6(2) provides that the Combined Spectrum Tax EME Component for the financial year 2023-24 and subsequent years must be indexed; the ACMA is to determine the factor but it cannot exceed the factor published by the Australian Statistician for the ‘Consumer Price Index’ for the reference period of June for the applicable year.

In determining how much of the annual increased amount of spectrum tax is to be borne by each Designated Spectrum Licence, the ACMA is required under subsection 6(3) to adopt objective and equitable criteria; to have regard to the total amount of spectrum each holder of

a Designated Spectrum Licence may use under their Designated Spectrum Licence(s); and to have regard to any other matters which the ACMA considers relevant. These general parameters are set so that the ACMA can have regard to any issues raised by spectrum licence holders during consultations concerning the distribution of the taxation burden.

Subsection 6(4) directs the ACMA to make the necessary amendments to the Spectrum Determination under paragraphs (1)(a)-(c), within 5 months of the commencement of the Direction and have effect on and from 11 October 2020. This excludes amendments made under paragraph 6(1)(d) and subsection 6(2). For enhanced transparency, the ACMA is required to designate, in a clear and unambiguous way, the EME component of the spectrum licence tax, including labelling it “EME Component”. This will provide a distinguishable tax calculation between those licencees who are not liable for the EME Component and to distinguish this tax from the ordinary cost recovery function of this taxation measure. Subsection 6(5) directs the ACMA to make the necessary amendments to the Spectrum Determination under paragraph 6(1)(d) and subsection 6(2), no later than one day before each Spectrum Holding Date for the applicable financial year from 2023-2024 onwards, and to ensure that future Spectrum Determinations include clear designation and labelling of the “EME Component”.

Statement of Compatibility with Human Rights

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

Australian Communications and Media Authority (Modifications to Apparatus and Spectrum Licences Taxes) Direction 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Ministerial Direction (the Instrument) to the Australian Communications and Media Authority (ACMA) requires ACMA to amend taxation arrangements which provide the financial offset for the Enhanced Electromagnetic Energy (EME) Program (the Program) as announced by the Australian Government on 16 December 2019. The Program funds a range of research and engagement activities relating to the EME which is emitted from telecommunications facilities. The new program will focus on research and information regarding emerging communications technologies, including research into EME from 5G facilities.

The current offset for the Program is funded through general taxation on transmitter and receiver licence holders. This Instrument requires the ACMA to no longer collect the EME tax component from these license holders - who can include private individuals through to small businesses, local governments and large corporations - and transfer the tax component to certain spectrum licence holders.

The Instrument requires ACMA to make the necessary changes to the spectrum licence tax determination in order to collect a set amount each financial year. The ACMA is to determine how much tax each liable licence holder should pay.

Human rights implications

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

Conclusion

This Instrument is compatible with human rights.