

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023* (**the instrument**) under subsection 88(1) of the *Radiocommunications Act 1992* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Subsection 88(1) of the Act provides that the ACMA may determine rules for assignments of spectrum licences, and rules setting out the circumstances in which licences can be varied, issued or cancelled as the result of an assignment.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Purpose and operation of the instrument

The instrument sets out the rules for the trading of spectrum licences, in accordance with section 88 of the Act.

A spectrum licence authorises the licensee to operate radiocommunications devices in the parts of the spectrum, and the geographic areas, specified in the conditions of the licence. Subsection 85(1) of the Act provides that the licensee of a spectrum licence may assign, or otherwise deal with, the whole or any part of the licence. Subsection 85(2) provides that an assignment must comply with any rules made under section 88 of the Act.

The *Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012* (**the 2012 instrument**) was made under section 88 of the Act, and set rules for the assignment of spectrum licences. The instrument revoked the 2012 instrument, which was due to sunset on 1 April 2023.

The rules for assignments set by the 2012 instrument included a requirement to trade in defined “standard trading units”, and for assignments to preserve a specified minimum contiguous bandwidth (**MCB**), unless permission were granted by the ACMA. The 2012 instrument also set out the substance and format of information that must be provided to the ACMA when assignment of a spectrum licence occurs. It also established the process for the ACMA to consider an application to undertake a spectrum licence trade that would result in a holding of less than the MCB.

The instrument largely replicates the substance of the 2012 instrument, but introduces minor administrative and structural changes, including:

- replacing the list of MCBs in specified bands in Schedule 1 to the instrument with a default MCB of 5 MHz and a list of exceptions for certain bands;
- providing timeframes relating to applications for approval for assignments resulting in less than the MCB; and
- making a number of minor changes to align the instrument with other legislative instruments made under the Act, and to provide more clarity around the trading and review process.

To the extent the instrument deals with spectrum licences in the 3.4 GHz to 4 GHz frequency band, the ACMA had regard to the *Radiocommunications (Ministerial Policy Statement – 3.4-4.0 GHz) Instrument 2022*, as required by section 28C of the Act.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*. The instrument is subject to the sunset provisions of the LA.

Documents incorporated by reference

Subsection 314A(1) of the Act provides that an instrument under the Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matters contained in any Act or any other instrument or writing as in force or existing at a particular time or from time to time.

The instrument incorporates:

- a form approved by the ACMA under the 2012 instrument, as existing immediately before the 2012 instrument was revoked; and
- the Australian Spectrum Map Grid 2012, as existing from time to time.

Both the form and the Australian Spectrum Map Grid 2012 are published by the ACMA and are available, free of charge, on the ACMA's website at www.acma.gov.au.

The instrument contains provisions and notes that refer to the Act, the LA, the AIA and the *Australian Communications and Media Authority Act 2005*. These references do not, however, incorporate those Acts.

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

In October 2022, the ACMA released a consultation paper that outlined the reasons for continuing the substance of the 2012 instrument, as well as the proposed changes to the 2012 instrument.

Three submissions were received. Submissions supported remaking the instrument and were generally supportive of the proposed changes. Submissions also proposed several additional changes, these were:

- geographic trading restrictions, similar to existing MCB restrictions;
- inclusion of adjacent licences held by related body corporates, and adjacent apparatus licences held by spectrum licensees, in assessing MCB;
- mechanisms for expediting the ACMA's decision-making processes; and
- delegating the decision to give permission for a trade to ACMA staff under certain circumstances.

The ACMA had regard to these submissions in remaking the instrument.

The ACMA did not make any of the suggested changes. The ACMA considered that:

- it is impractical to impose geographic trading restrictions, beyond the “standard trading unit” concept;

- rather than change the instrument to provide for the inclusion of licences held by related body corporates and apparatus licences held by spectrum licensees, these matters could be considered by the ACMA when deciding whether to give permission to an assignment that would result in a spectrum licence of less than the MCB;
- the 90 day period for decisions on permission is a maximum time and is consistent with section 286 of the Act, and the ACMA expects usually to make decisions in a shorter period than provided for; and
- the delegation of powers conferred on the instrument is not a matter for the instrument.

A more detailed outline of the outcomes of the consultation is available on the ACMA’s website.

Regulatory impact assessment

A preliminary assessment of the proposal to make the instrument was conducted by the Office of Impact Analysis (**OIA**) (formerly the Office of Best Practice Regulation (**OBPR**)), based on information provided by the ACMA, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OIA advised that a RIS would not be required because the instrument is expected to only have minor or machinery impacts (OIA reference number OBPR22-03221).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

The instrument sets out the rules for the trading of spectrum licences, in accordance with section 88 of the Act.

The 2012 instrument was made under section 88 of the Act, and set rules for the assignment of spectrum licences. The instrument revoked the 2012 instrument, which was due to sunset on 1 April 2023.

The rules for assignments set by the 2012 instrument included a requirement to trade in defined “standard trading units”, and for assignments to preserve a specified MCB, unless permission were granted by the ACMA. The 2012 instrument also set out the substance and format of information that must be provided to the ACMA when assignment of a spectrum licence occurs. It also established the process for the ACMA to consider an application to undertake a spectrum licence trade that would result in a holding of less than the MCB.

The instrument largely replicates the substance of the 2012 instrument, but introduces minor administrative and structural changes, including:

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- making a number of minor changes to align the instrument with other legislative instruments made under the Act, and to provide more clarity around the trading and review process.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

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

Notes to the *Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023*

Section 1 Name

This section provides for the instrument to be cited as the *Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the instrument, namely subsection 88(1) of the Act.

Section 4 Repeal

This section repeals the *Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012* [F2012L01718].

Section 5 Interpretation

This section defines a number of key terms used throughout the instrument. A number of other expressions used in the instrument are defined in the Act.

Section 6 References to other instruments

This section provides that in the instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument or writing is a reference to that other instrument or writing as in force or existing from time to time.

Section 7 Application

This section provides that the instrument does not apply to the assignment of certain spectrum licences issued to the Department of Defence. At the time the instrument was made, trading rules for those spectrum licences were specified in the *Radiocommunications (Trading Rules for Defence Spectrum Licences) Determination 2015*.

Section 8 Provision of information about assignments

This section provides that the ACMA must approve a form to be used by parties to an assignment of a spectrum licence, and outlines the kinds of information that must be included in the trading form. The parties to an assignment must give the ACMA a copy of the trading form with the required information. It also includes transitional provisions that allow the parties to use the form approved under the 2012 instrument, until the new form is approved.

Section 9 Rules about assignments

This section sets out the rules that an assignment of a spectrum licence must comply with, as required by subsection 85(2) of the Act.

Subsection (1) provides that the assignment of part of a spectrum licence must be for one or more standard trading units, which is defined as part of the spectrum such that the lower limit is an integer and the upper limit is an integer, both expressed in Hertz, and an HCIS Level 1 cell as specified in the Australian Spectrum Map Grid 2012.

Subsection (2) provides that an assignment of part of a spectrum licence must not result in a spectrum licence that authorises the operation of radiocommunications devices in a part of a frequency band that is less than the MCB. The MCB is generally 5 MHz; however, spectrum licences in some bands specified in Schedule 1 to the instrument have an MCB of 10 MHz or 50 MHz.

Subsection (3) provides that the ACMA may give permission for a licensee to assign part of a spectrum licence which would otherwise be prohibited under subsection (2).

Subsection (4) provides that a licensee must not assign a spectrum licence, or part of a spectrum licence, for the purpose of providing security for a loan. This provision is intended to prevent a bank or financial institution from holding legal title to a spectrum licence, which would pose logistical challenges for spectrum management, compliance and enforcement.

Section 10 Permission for assignment resulting in less than the minimum contiguous bandwidth

This section outlines the process and timeframes for seeking permission for an assignment that would result in a spectrum licence that authorises the operation of radiocommunications devices in a part of the spectrum less than the MCB.

Under subsections (1) to (4), the licensee may apply for permission, in writing in a form approved by the ACMA, and in a manner approved by the ACMA. A charge may apply, if set under section 60 of the *Australian Communications and Media Authority Act 2005*.

Under subsections (5) to (8), the ACMA has 90 days (or such longer time as agreed with the licensee) to decide whether to give permission. If the ACMA gives permission, it must specify a period, beginning from the date permission is given, within which the assignment must occur. The period may be between 45 days and 90 days long; however, the assignment can occur at any point during that period. The ACMA must give the licensee written notice of its decision within 14 days after making the decision.

Subsections (9) to (12) outline the process for a licensee to apply for the ACMA to reconsider a decision to refuse permission, and the timeframes which apply.

Subsection (13) provides that if a decision to refuse permission is affirmed, the licensee may apply to the Administrative Appeals Tribunal for review of that decision.

Schedule 1– Minimum contiguous bandwidth

This schedule provides that the MCB is 5 MHz, subject to the following exceptions:

- 10 MHz for spectrum licences in 3400 MHz to 3800 MHz; and
- 50 MHz for spectrum licences in 25100 MHz to 27500 MHz.