

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications (Spectrum Licence Tax) Act 1997

Radiocommunications (Spectrum Licence Tax) Amendment Determination 2023 (No. 1)

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Spectrum Licence Tax) Amendment Determination 2023 (No. 1)* (**the Amendment Determination**) under subsection 7(1) of the *Radiocommunications (Spectrum Licence Tax) Act 1997* (**the SLT Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Subsection 7(1) of the SLT Act provides that the amount of tax imposed 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 AIA relevantly provides that when an Act confers a power to make an instrument, that power shall, unless the contrary intention appears, be construed as including a power exercisable in a like manner and subject to like conditions, to amend that instrument.

Purpose and operation of the instrument

The Amendment Determination amends the *Radiocommunications (Spectrum Licence Tax) Determination 2021* (**the Determination**). The Determination determines the amount of tax imposed by the SLT Act on the initial holding date for a spectrum licence, and on each anniversary of that date. The Determination determines different rates of tax in relation to different classes of spectrum licence, based on the frequency range of the licence and the population coverage of the licence relative to the Australian population. The Determination determines spectrum licence tax by setting two components: a main component, payable in relation to all spectrum licences, and an electromagnetic energy component (**the EME component**), payable in relation to only some spectrum licences.

According to the explanatory memorandum to the Radiocommunications (Spectrum Licence Tax) Bill 1997, it is appropriate to allow the assessment of the cost of spectrum management, and resultant spectrum licence taxes, to be determined by the regulatory authority with close knowledge of the radiocommunications industry, the responsibility for managing spectrum and the responsibility for allocating radiocommunications licences. That explanatory memorandum also said that it was inappropriate to impose a limit on the amount of the spectrum licence tax determined, because of the nature of spectrum licensing and the possibility of a single licensee holding a large proportion of the spectrum in a given band, and therefore paying a proportionally larger amount than other licensees.

That explanatory memorandum also stated that, given this power is legislative in nature, it is appropriate that Parliament be able to disallow an exercise of the power, and that, in accordance with what ultimately became the *Legislation Act 2003* (**LA**), there would be an obligation in relation to consultation before making or varying any instrument under this power.

Amount of tax to offset electromagnetic energy program

The Determination sets, as a part of spectrum licence tax payable by some licensees, the EME component, as required by the *Australian Communications and Media Authority (Modifications to Apparatus and Spectrum Licences Taxes) Direction 2020* (**the Direction**). According to the Direction, the EME component will be used to offset expenditure related to the Commonwealth's electromagnetic energy program (**EME program**).

The EME component is added to the main component of spectrum licence tax, in relation to a specified class of spectrum licences. For spectrum licence tax imposed in the 2023-24 financial year, the Direction requires the ACMA to set spectrum licence tax imposing EME components totalling not more than \$1,900,000, indexed by the Consumer Price Index (**CPI**) for the reference period of June 2023.

The CPI for the reference period of June 2023 was 6.0%. The Amendment Determination varies the Determination so that the total EME components of the spectrum licence tax imposed in the 2023-24 financial year is \$2,014,000 (\$1,900,000 indexed by 6.0%). This amount is apportioned between those spectrum licensees subject to the EME component of spectrum licence tax, based on the frequency range of the licence and the population coverage of the licence relative to the Australian population.

Amount of tax imposed on new spectrum licences

The Determination currently sets an amount of spectrum licence tax to be imposed on spectrum licences in the 3400 MHz to 3700 MHz frequency band. The ACMA has made the *Radiocommunications Spectrum Marketing Plan (3.4/3.7 GHz Bands) 2023 (the Marketing Plan)* and the *Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023 (the Allocation Determination)*, which set the rules and procedures concerning the auction of spectrum licences in this frequency band, but also in the 3700 MHz to 3800 MHz frequency band. The Amendment Determination varies the Determination to set an amount of spectrum licence tax on any spectrum licences issued in the 3700 MHz to 3800 MHz frequency band.

This change made by the Amendment Determination ensures that the licensees of spectrum licences issued in the 3700 MHz to 3800 MHz frequency band pay the equivalent amount of spectrum licence tax to those with spectrum licences in the 3400 MHz to 3700 MHz frequency band. This change does not affect the amount of the ‘main component’ or ‘EME component’ in relation to existing spectrum licences in the 3400 MHz to 3700 MHz frequency band (though the EME component change discussed above may affect the total amount of tax payable in relation to such licences).

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

The Amendment Determination is a disallowable legislative instrument for the purposes of the LA. The Determination is subject to the sunset provisions of the LA.

Documents incorporated by reference

The Amendment Determination does not amend the Determination to incorporate any additional documents. The Amendment Determination amends the Determination to include a reference to the Direction, without incorporating it by reference. The Direction is available, free of charge, from the Federal Register of Legislation.

Consultation

Before the Amendment Determination 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.

The ACMA consulted in February and March 2023 on the proposal to set an amount of tax in relation to spectrum licences in the 3700 MHz to 3800 MHz frequency band in the Determination. No concerns were raised in the submissions to the proposal.

Explanatory Statement to the Radiocommunications (Spectrum Licence Tax) Amendment Determination 2023 (No. 1)

On 27 July 2023, the ACMA published a consultation paper that set out the proposed changes to the Determination concerning the change to the total annual EME component for the 2023-24 financial year. This July consultation paper also noted the proposal to set an amount of tax in relation to spectrum licences in the 3700 MHz to 3800 MHz frequency band in the Determination, which was outlined in the February and March 2023 consultation. The ACMA received 2 submissions to the July consultation paper. Both submissions addressed the change in the total annual EME component, and both raised other matters beyond the scope of the Amendment Determination. In making this Amendment Determination, the ACMA took into account these submissions, but did not change the proposals outlined in the July consultation paper.

Regulatory impact assessment

For the changes to the Determination relating to the total annual EME component, the Office of Best Practice Regulation (**OBPR**) had previously advised that these amendments would not give rise to a regulatory change and therefore formed the opinion that no regulatory impact analysis is required (OBPR reference: 25404). The Office of Impact Analysis (**OIA**) has confirmed this to be the case.

In making the Allocation Determination and the Marketing Plan, the OBPR advised that an impact analysis would not be required because the proposed regulatory changes were minor or machinery in nature – reference number OBPR 22-01921. For the changes to the Determination relating to the proposal to set an amount of tax in relation to spectrum licences in the 3700 MHz to 3800 MHz frequency band, the OBPR also confirmed that the proposal was machinery in nature and therefore did not require further action.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a 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.

This statement of compatibility has been prepared in accordance with that requirement.

Overview of the instrument

The purpose of the Amendment Determination is to:

- set the amount of the main component of spectrum licence tax imposed in relation to spectrum licences to be issued in the 3700 MHz to 3800 MHz frequency band; and
- to set the total annual EME component of spectrum licence tax imposed in the 2023-24 financial year as \$2,014,000, consistently with the Direction.

Human rights implications

The ACMA has assessed whether the Amendment Determination 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 Amendment Determination 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 Amendment Determination is compatible with human rights and freedoms as it does not raise any human rights issues.

Notes to the *Radiocommunication (Spectrum Licence Tax) Amendment Determination 2023 (No. 1)*

Section 1 Name

This section provides for the Amendment Determination to be cited as the *Radiocommunications (Spectrum Licence Tax) Amendment Determination 2023 (No. 1)*.

Section 2 Commencement

This section provides for the Amendment Determination 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 SLT Act that authorises the making of the Amendment Determination, namely, subsection 7(1) of the SLT Act.

Section 4 Amendments

This section provides that the instrument that is specified in Schedule 1 is amended as set out in that Schedule.

Schedule 1—Amendments

Item 1

Item 1 replaces table item 9 in clause 2 of Schedule 1 to the Determination, so that a main component of spectrum licence tax is specified for the 3400 MHz to 3800 MHz frequency band, instead of the 3400 MHz to 3700 MHz frequency band. This change does not affect the ‘main component’ of tax that may be payable in relation to existing licences in the 3400 MHz to 3700 MHz frequency band.

Item 2

Item 2 amends clause 1 of Schedule 2 to the Determination to specify the total EME component for the 2023-2024 financial year to be \$2,014,000.

Item 3

Item 3 omits an outdated example of the EME component calculation from clause 2 of Schedule 2 to the Determination.