Automatic sunsetting of legislative instruments

**Proposal to remake the Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012**

Consultation paper

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# Background

## Automatic sunsetting of legislative instruments

Part 4 of Chapter 3 of the *Legislation Act 2003* sets out the provisions for sunsetting of legislative instruments. Generally, legislative instruments sunset (automatically repeal) on 1 April or 1 October that first occurs after the 10th anniversary of their registration.

The [Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012](https://www.legislation.gov.au/Details/F2021C00941) (the determination) is due to sunset on 1 April 2023.

A copy of the determination is available at the link above. The ACMA is considering whether the determination is operating efficiently and effectively within the current legislative framework and should be remade prior to the sunsetting date.

## This paper and our preliminary view

Our preliminary view is the determination should continue, and that it is largely fit-for-purpose. We believe it should be remade with minor administrative and structural changes. This paper invites comment on the determination and its place in the regulatory framework. We seek feedback on a number of targeted questions.

The ACMA proposes to remake the instrument with only such minor, necessary changes as are referred to below, with the new instrument to be called the Radiocommunications (Trading Rules for Spectrum Licences) Determination 2022.

# About the determination

## What the instrument does

The determination sets out rules for spectrum licence trades, including:

* Restrictions on trading spectrum licences, including the requirement to trade in defined units of spectrum and the requirement to preserve a specified minimum contiguous bandwidth (MCB).
* The substance and format of information that must be provided to us when trading a spectrum licence.
* 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. This includes the mechanisms for review of an ACMA decision to refuse written approval of such a trade.

# Regulatory environment

This section discusses the current spectrum policy and regulatory environments as they relate to spectrum licence trades.

## The Radiocommunications Act 1992

Spectrum licence trades are permitted under Division 5 of Part 3.2 of the [Radiocommunications Act 1992](https://www.legislation.gov.au/Details/C2021C00462/Download) (the Act). This provides that the licensee of a spectrum licence may assign, or otherwise deal with, the whole or any part of the licence provided the assignment complies with any rules made under section 88 of the Act.

Subsection 88(1) provides that the ACMA may, by legislative instrument, determine rules for assignments of spectrum licences.

Such an assignment cannot take effect until the Register of Radiocommunications Licences is amended to take it into account (section 86).

## Policy objectives

Section 3 of the Act outlines its object.

The object of this Act is to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that:

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

To the extent the determination affects spectrum licences in the 3.4 GHz to 4 GHz frequency band, we must have regard to the [Radiocommunications (Ministerial Policy Statement – 3.4–4.0 GHz) Instrument 2022](https://www.legislation.gov.au/Details/F2022N00015) (the MPS). The instrument sets out the following Commonwealth Government policy objectives for that band:

* supporting the deployment of new and innovative technology, including 5G

promoting competitive markets.

* supporting a range of use cases and users
* supporting digital connectivity and investment in regional Australia

The ACMA considers that the latter 2 objectives of the MPS have limited applicability to the determination, as they are handled principally through the allocation of licences rather than through spectrum trades.

Guided by these objectives, the ACMA seeks the following outcomes from the determination:

* To facilitate efficient use of the spectrum through setting standard trading units and MCB. We are planning to implement a MCB of 10 MHz in the 3.4 GHz to 3.8 GHz frequency band in order to support the deployment of 5G, as per the MPS.
* To promote secondary trading between licensees within an overarching regulatory framework that facilitates efficient spectrum use.

That licensees engaging in trades provide certain information to the ACMA so we can fulfil our obligations to keep the Register of Radiocommunications Licences up-to-date and so there is relevant information to support appropriate interference management between licensees.

To promote competition in spectrum markets by facilitating the trading of spectrum licences.

Please note that Defence spectrum licences are subject to rules in the [Radiocommunications (Trading Rules for Defence Spectrum Licences) Determination 2015](https://www.legislation.gov.au/Details/F2015L01217).

# Issues for comment

The ACMA is seeking comment on the continuing need for the determination and whether the instrument is effective and fit for purpose. We are also seeking comment on minor administrative and structural changes to align it with similar instruments and make certain aspects of the determination simpler.

**The need for the determination**

The ACMA has a responsibility to manage spectrum, and to facilitate its efficient use. To support this, we must be aware of who is licensed to use the spectrum and the parts of the spectrum licensed for use. There is also a need for restrictions on spectrum trading units and an MCB to support the efficient use of spectrum.

We are of the view that the determination is a necessary tool to support the effective management of the spectrum, and as such it should be remade.

**Question 1**

Is the determination still required? Why or why not?

### Effectiveness and efficiency of the determination

We are of the preliminary view that the determination is concise and easily comprehensible, and imposes the minimum regulatory burden necessary to support licence trades. The provisions clearly outline the obligations of licensees and the requirements for spectrum licence trades.

**Question 2**

Is the determination operating effectively and efficiently?

### Schedule 1: minimum contiguous bandwidth

We propose to replace the list of MCBs in specified bands in Schedule 1 with a standard MCB of 5 MHz across the spectrum and a list of exceptions for
certain bands.

This amendment would not alter the MCBs currently in force. Most bands already have an MCB of 5 MHz, and those that do not are intended to be identified in the list of exceptions. We are seeking to simplify MCB requirements by providing a single standard rule, and to reduce the need for further updates to the determination. This is in the event that spectrum licences in additional bands are allocated beyond those in the current list and those bands do not warrant an MCB other than 5 MHz.

**Question 3**

Are the proposed changes to Schedule 1 appropriate?

### Administrative and structural changes

The ACMA proposes a number of minor changes in order to align the determination with similar instruments and provide more clarity around the trading process. The proposed changes are:

Additional detail about the kind of information that must be included in a trading form, such as the licence number of the affected licence.

Additional detail about the process for applying for permission for an assignment, resulting in a holding of less than the MCB, including:

The form an application for permission should take.

The information that should be included in the application.

That the ACMA must make a decision about an application within 90 days, and communicate that decision within 14 days. If permission is refused, we must provide reasons for the decision.

That the licensee must assign the licence (or part thereof) within a period to be specified in the permission, of between 45 and 90 days.

Provisions that allow a licensee to request we review a refusal to grant permission for an assignment resulting in less than the MCB. The determination currently provides for reconsideration by the Administrative Appeals Tribunal, and this will also be retained, after seeking internal review by the ACMA.

Clarifying that the determination does not apply to spectrum licences where the licensee is the Department of Defence.

Additional minor and non-substantive drafting changes.

**Question 4**

Are the proposed amendments appropriate? Are additional amendments required?

# Invitation to comment

#### Making a submission

The ACMA invites comments on the issues set out in this consultation paper.

Online submissions can be made by uploading a document. Submissions in PDF, Microsoft Word or Rich Text Format are preferred.

Submissions can be emailed to SpectrumAllocations@acma.gov.au.

Submissions close at **5 pm AEDT, Monday 14 November 2022**.

Consultation enquiries can be emailed to SpectrumAllocations@acma.gov.au.

#### Publication of submissions

The ACMA publishes submissions on our website, including personal information (such as names and contact details), except for information that you have claimed (and we have accepted) is confidential.

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