Remaking the radiocommunications trading rules determination

Outcomes paper

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[Executive summary 4](#_Toc127367044)

[Introduction 5](#_Toc127367045)

[Automatic sunsetting of legislative instruments 5](#_Toc127367046)

[The Radiocommunications Act 1992 5](#_Toc127367047)

[Policy objectives 5](#_Toc127367048)

[Summary of submissions 7](#_Toc127367049)

[Responses to issues for comment 7](#_Toc127367050)

[Outcomes of consultation 9](#_Toc127367051)

Executive summary

This outcomes paper describes the decisions the ACMA has adopted in remaking the [Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012](https://www.legislation.gov.au/Details/F2021C00941)
(the determination), in response to submissions received on our *Proposal to remake the Radiocommunications (Trading Rules for Spectrum Licences) Determination 2012* consultation paper (the consultation paper). The determination is due to expire on
1 April 2023.

We received 3 submissions to the consultation paper. This paper summarises these submissions, analyses their proposals and describes how we reached our decisions. Full copies of the public submissions, the consultation paper and draft Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023,
are available on the [consultation webpage](https://www.acma.gov.au/consultations/2022-10/remaking-radiocommunications-trading-rules-determination-consultation-332022).

We have decided to make the [Radiocommunications (Trading Rules for Spectrum Licences) Determination 2023](https://www.legislation.gov.au/Details/F2023L00118) (the 2023 determination) as it was presented in the draft. We will decide whether to delegate certain powers under the 2023 determination to ACMA staff at a later date.

# Introduction

## 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 determination is due to sunset on 1 April 2023.

A copy of the determination is available via the link to the consultation page
above. We have considered whether the determination is operating efficiently and effectively within the current legislative framework and should be remade prior to the sunsetting date.

## The Radiocommunications Act 1992

Spectrum licence trades are permitted under Division 5 of Part 3.2 of the *Radiocommunications Act 1992* (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 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, we seek the following outcomes from the determination:

* To facilitate efficient use of the spectrum through setting standard trading units and minimum contiguous bandwidth (MCB). We are planning to implement a MCB of 10 MHz in the 3.4–3.8 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).

# Summary of submissions

We received 3 submissions to the consultation paper. The submissions can be found on the [ACMA website](https://www.acma.gov.au/consultations/2022-10/remaking-radiocommunications-trading-rules-determination-consultation-332022).

Submissions were received from:

AMTA

Optus

Telstra.

This section summarises responses to the issues for comment in the consultation paper.

## Responses to issues for comment

**Question 1**

Is the determination still required? Why or why not?

Submissions agreed that the determination is still required.

**Question 2**

Is the determination operating effectively and efficiently?

AMTA stated that the determination is operating efficiently, and that it supports the light-touch regulatory approach that does not create undue administrative burden. However, AMTA also noted that there are aspects of the determination that could be changed to improve its effectiveness. These aspects are addressed as part of Question 4.

Optus supported AMTA’s response, and noted that the light-touch regulatory approach has been largely fit-for-purpose, while also suggesting that drafting may be improved to reduce administrative processes.

Telstra stated that remaking the determination provides an opportunity to improve its effectiveness.

**Question 3**

Are the proposed changes to Schedule 1 appropriate?

We proposed 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. We also proposed a MCB of 10 MHz for the 3.4 GHZ to 3.8 GHz bands.

Submissions supported these changes.

**Question 4**

Are the proposed amendments appropriate? Are additional amendments required?

We proposed 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 were:

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 a maximum of 90 days, and communicate that decision within 14 days. If permission is refused, the ACMA 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. The period specified must be at least 45 days, and no more than 90 days. The assignment can occur at any time during the period specified.

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.

Submissions agreed with the proposed changes. Submissions noted that the additional requirements relating to provision of information may increase administrative burden, but they did not specifically object to this change.

Five additional proposals were provided in the submissions. Submissions were largely aligned in proposing these changes. These proposals are:

Geographic trading restrictions, similar to existing MCB restrictions.

Inclusion of related bodies in assessing MCB.

Inclusion of differing licence types in assessing MCB.

Mechanisms for expediting the ACMA’s decision-making processes.

Delegating the decision to give permission for a trade to ACMA staff under certain circumstances.

These proposals are discussed in detail below.

# Outcomes of consultation

This section presents the outcomes of the consultation process and explains the reasons for our decisions.

**Remaking the determination**

The ACMA has decided to make the 2023 determination, which repeals and replaces the determination.

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 facilitates the efficient planning, allocation and use of the spectrum. To support efficient spectrum management and use, 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, should be remade. Submissions supported this view.

**Changes to Schedule 1**

We have decided to adopt the proposed changes to Schedule 1. The list of MCBs in specified bands in Schedule 1 has been replaced with a standard MCB of 5 MHz across the spectrum and a list of exceptions for certain bands. A MCB of 10 MHz for the 3.4 GHz to 3.8 GHz band has been implemented.

This structure is simpler and more concise, and will reduce the need for further updates to the 2023 determination as additional bands are allocated beyond those in the current list. Submissions supported this view.

**Proposed administrative and structural amendments**

The ACMA has decided to adopt the proposed administrative and structural changes.

These changes do not substantively alter the operation of the determination or the types of trades that may be conducted. Rather, these changes provide clarity around the application, decision-making and review process for trades. This includes giving affected persons the right of internal reconsideration before progressing to external review of decisions not to give permission for an assignment that would result in a licence for less than the MCB.

While the ACMA acknowledges that submissions noted that the requirement to provide additional information about a trade may increase administrative burden on licensees, we consider that this burden is minimal. It has already been standard practice of the ACMA to request this information, even if not required by the determination. Additionally, the information is likely to be readily available to licensees.

**Geographic trading restrictions**

Submissions proposed amendments to the instrument to require permission for trades that ‘result in geographic boundaries that do not align with the original spectrum licence’. This would operate similar to existing MCB restrictions, applied geographically instead of on a frequency basis. Submissions claimed that this would prevent geographic fragmentation of the spectrum.

The ACMA has not adopted this proposal. We consider it would have negligible benefits in terms of reducing the likelihood of fragmentation, and would also increase administrative burden on licensees and the ACMA. In particular, this proposal if adopted would mean that we would have to consider a wide array of trades, rather than allowing the market to operate within a defined framework.

While there have been a small number of trades in the past that have resulted in geographic fragmentation, it is unclear whether we would have refused permission for those trades if our permission had been required under the determination. Furthermore, this fragmentation was the result of a number of different factors such as differing use cases and licensing arrangements in the band, and allocations occurring across multiple processes – in addition to the particular spectrum trades.

Our spectrum licence allocations have tended to result in the issue of licences that cover a relatively wide geographic area. Smaller geographic areas can be very useful from a spectrum utility perspective, in contrast to small fragments of frequency. In particular, we note interest in various bands by parties wishing to provide targeted services in particular areas, including in the 3.4 GHz to 4 GHz frequency band as per the MPS.

**Inclusion of related bodies in assessing MCB**

Submissions proposed that the collective adjacent spectrum holdings of related bodies corporate be included in determining whether the resulting holding is less than the MCB. For example, if a trade resulted in party X and party Y (a subsidiary of party X) both holding 2.5 MHz of adjacent spectrum (below the 5 MHz MCB), it could be treated as a combined holding of 5 MHz (equal to the MCB), and not require
our permission.

The ACMA has not adopted this proposal. We consider that there is likely to be minimal benefit to such an arrangement.

In the example above, the 2 parties could become unrelated entities, once again leaving 2 separate spectrum holdings of 2.5 MHz, causing fragmentation. Similarly, party X may wish to trade its 2.5 MHz spectrum holding. Such a trade would result in fragmentation unless that party was restricted from conducting the trade without party Y trading its adjacent spectrum in tandem. We consider that such an arrangement would place unnecessary restriction on licensees.

Under current arrangements, licensees can seek permission from the ACMA to conduct a trade resulting in a holding below the MCB. A licensee who wishes to conduct such a trade is free to include the spectrum holdings of related bodies in its issues for consideration when requesting permission from the ACMA. This approach allows us to consider trades concerning related bodies corporate on a case-by-case basis and account for the particular circumstances of the trade, such as how likely the parties are to become unrelated or how the spectrum is intended to be used.

We consider that trades of this nature are unlikely to occur with regularity. As such, having us consider and approve such trades is unlikely to impose a substantial burden on licensees, or materially impede the functioning of the market.

**Inclusion of apparatus licences in assessing MCB**

Similar to the previous proposal, submissions proposed that where a licensee holds an apparatus licence adjacent to a spectrum licence being traded, that licence should be included when determining whether a trade results in a holding of less than the MCB. For example, if a trade resulted in a licensee holding a 2.5 MHz spectrum licence, adjacent to a 2.5 MHz apparatus licence, it would be treated as a combined holding of 5 MHz (equal to the MCB), and not require ACMA permission.

We have not adopted this proposal. As with the previous proposal, the ACMA considers that this introduces a number of complexities and that there is likely to be minimal benefit.

Spectrum licences often differ from apparatus licences on matters such as licence terms, duration and intended use cases. In the example given above, the apparatus licence could expire before the spectrum licence, leaving the licensee with a holding of 2.5 MHz, below the MCB.

As with the previous proposal, a licensee may include adjacent licences of differing types in its issues for consideration when requesting permission from the ACMA. This allows us to consider such trades on a case-by-case basis and approve them where appropriate.

Again, we consider that trades of this nature are unlikely to occur with regularity and the approval process of such trades is unlikely to impose a substantial burden on licensees.

Given the factors outlined above, we consider that the benefits of adopting this proposal are minimal.

**Cases where the permission process should be expedited**

Submissions proposed that the determination should allow for expedited trade permissions/reviews from the ACMA (below the 90-day maximum), where justified by financial or operational circumstances.

We have not adopted this proposal. The ACMA can factor in financial and operational circumstances in determining the urgency with which to act, and can usually reach a decision within a shorter timeframe where required.

**Delegation of decision to approve a trade resulting in a holding below the MCB**

Submissions proposed that the decision to approve partial trades resulting in a holding below the MCB should be delegated to ACMA staff in the first instance. Where the trade would result in defragmentation, ACMA staff should be able to approve the trade. Only where it is not clear that the trade would result in defragmentation, approval would be required by the ACMA.

Whether the power is delegated is not a matter that needs to be included in the 2023 determination. We will consider our internal governance arrangements in the usual way, and do not intend to make any announcement about them.