**EXPLANATORY STATEMENT**

Approved by the Australian Communications and Media Authority

*Radiocommunications Act 1992*

***Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021***

**Authority**

The Australian Communications and Media Authority (the ACMA) has made the *Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021* (the Determination) under subsection 294 (1) of the *Radiocommunications Act 1992* (the Act).

Subsection 294 (1) of the Act empowers the ACMA to make determinations to fix spectrum access charges payable by licensees for issuing spectrum licences and to specify the times when spectrum access charges are payable.

**Purpose and operation of the instrument**

The Determination fixes spectrum access charges payable for the re-issue of spectrum licences in the 20 GHz band and the 30 GHz band (referred to as the 20 GHz Defence band and 30 GHz Defence band in the Determination), and specifying the times when spectrum access charges are payable.

*Background*

The Department of Defence (Defence) holds two spectrum licences covering the frequency ranges 20.2– 1.2 GHz (the 20 GHz band) and 30–31 GHz (the 30 GHz band) Australia‑wide. They were issued on 27 April 2006 and are due to expire on 26 April 2021.

On 1 May 2020, the ACMA issued a notice under section 78 of the Act (section 78 notice), publicly advising about the upcoming expiry of these licences, and the parts of the spectrum to which they relate. Defence indicated a preference to retain these spectrum licences to continue the use of various satellite communications systems they utilise in those bands. Other responses to the section 78 notice raised no objections to Defence continuing to hold these spectrum licences and indicated little interest from other spectrum users gaining access to the 20 GHz and 30 GHz bands alongside Defence.

The ACMA is therefore preparing to re-issue the two spectrum licences to Defence. The intent is to re-issue these licences under paragraph 82 (1)(b) of the Act, which allows the re-issue of spectrum licences to the same licensee if the ACMA is satisfied that special circumstances exist as a result of which the re-issue of the spectrum licence to the same person is in the public interest. The ACMA considers that special circumstances relating to these spectrum licences exist and include: the non-commercial nature of the use of these bands by Defence, the significant investment made by Defence in these bands, and the coordination of the use of the 20 GHz and 30 GHz bands between Defence and other international Defence organisations.

Subsection 294(1) of the Act provides that the ACMA may fix spectrum access charges payable by licensees, for spectrum licences issued to the licensee. In determining the spectrum access charges payable by the licensee, the amount must not be such as to amount to taxation (as provided for in section 297 of the Act).

To determine the amount of the spectrum access charges for the re-issue of the two spectrum licences, the ACMA took into account:

* the long-standing use of the 20 GHz and 30 GHz spectrum by Defence for defence activities; and
* that the previous spectrum access charges determined for the two spectrum licences issued to Defence in 2006, had been based on a consideration of the value of apparatus licences taxes, application of an inflation rate, and applying a discount factor that was based on the 10-year Commonwealth bond rate; and
* that there are few relevant price points either domestically or internationally in the 20 GHz and 30 GHz bands that would assist to determine the value of the spectrum access charges for the re-issued spectrum licences.

The ACMA considers the consideration of previous spectrum access charges and apparatus licence taxes, inflation rates and Commonwealth bond rates to determine a discount factor provide suitable benchmarks to determine the spectrum access charges for the re-issue of each of the 20 GHz and 30 GHz Defence spectrum licences. The history of prior licensing and pricing arrangements suggests that spectrum access charges based on these benchmarks would reflect the value of the spectrum to Defence and, therefore, would not amount to taxation.

The current annual transmitter licence tax for Defence apparatus licences on an Australia-wide basis in the 20 GHz and 30 GHz bands is $1.0469 per kHz,[[1]](#footnote-2) with the annual transmitter licence tax for a licence with 1 GHz of spectrum being $1,046,900. The average rate for a Commonwealth 10-year bond for January is 1.06 per cent.[[2]](#footnote-3)

Accordingly, the ACMA determined the spectrum access charges for the re-issue of each spectrum license as follows: the net present value of the 15-year spectrum licence based on an annual amount of $1,046,900, increased by an inflation rate of 1.5 per cent per annum[[3]](#footnote-4) and discounted over time by 1.06 per cent per annum is $16,191,243. This represents the spectrum access charge that Defence should be charged if Defence elects to pay the spectrum access charges upfront as a lump sum payment.

The determination also provides Defence with the option to elect to pay the spectrum access charges by 5 instalments. The amount of each of the 5 instalments is $3,306,896, until the total amount of $16,534,480 has been paid. The higher total spectrum access charge, where Defence has elected to pay by instalments, reflects a premium of 1.06 per cent per annum. The higher total spectrum access charge reflects the benefit provided to Defence to pay the spectrum access charges over a five-year period, while having access to the 20 GHz and 30 GHz Defence bands over that period.

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

The Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* (the LA).

**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 addition to issuing the notice under section 78 of the Act, the ACMA consulted directly with Defence, providing drafts of the proposed licences to be re-issued, and information about the estimated spectrum access charges for the two spectrum licences. Defence confirmed that it wanted the licences re-issued and raised no concerns about the proposed spectrum access charges, nor the proposed payment time for either the lump sum payment option or payment by instalments option.

**Regulatory impact assessment**

The Office of Best Practice Regulation (OBPR) has determined that the proposed regulatory change in this submission is minor or machinery in nature and has therefore verified that no further regulatory impact analysis is required. The OBPR reference number is 43286.

**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 Determination sets the amount of spectrum access charges payable for the re-issuer of the 20 GHz Defence band and 30 GHz Defence band spectrum licences, and specifies the times when the spectrum access charges are payable.

***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.

**Attachment A**

**Notes to the Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021**

**Section 1 Name**

This section provides for the Determination to be cited as the *Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021.*

**Section 2 Commencement**

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

**Section 3 Authority**

This section provides that the Determination is made under subsection 294 (1) of the Act.

**Section 4 Repeal of this instrument**

This section provides that this instrument is repealed at the end of 26 April 2036.

**Section 5 Definitions**

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 Spectrum access charge for the 20 GHz Defence band spectrum licence**

Section 6 provides the amount of spectrum access charge payable by the licensee for the re-issue of the 20 GHz Defence band spectrum licence. The licensee may elect to pay a single upfront payment of $16,191,243, or by 5 instalment payments of $3,306,896 each.

If the licensee elects to pay the single upfront amount, it must be paid on or before 6 April 2021. If the licensee elects to pay by instalments, the first instalment must be paid on or before 6 April 2021. Each of the 4 subsequent instalment payments must be paid on the anniversary of the day the licence came into force.

**Section 7 Spectrum access charge for the 30 GHz Defence band spectrum licence**

Section 7 provides the amount of spectrum access charge payable by the licensee for the re-issue of the 30 GHz Defence band spectrum licence. The licensee may elect to pay a single upfront payment of $16,191,243, or by 5 instalment payments of $3,306,896 each.

If the licensee elects to pay the single upfront amount, it must be paid on or before 6 April 2021. If the licensee elects to pay by instalments, the first instalment must be paid on or before 6 April 2021. Each of the 4 subsequent instalment payments must be paid on the anniversary of the day the licence came into force.

**Section 8 Election – 20 GHz and 30 GHz Defence band spectrum licences**

Section 8 provides that the licensee may elect to pay for the 20 GHz Defence band spectrum licence or the 30 GHz Defence band spectrum licence (or both) by instalments, subject to providing a written notice to the ACMA that they wish to pay for the relevant spectrum licence by instalments and giving that notice to the ACMA before 5 April 2021.

1. The annual transmitter licence tax for Defence apparatus licences on an Australia-wide basis in the 20 GHz and 30 GHz band is set out in Table 202 of Schedule 2 to the *Radiocommunications (Transmitter Licence Tax) Determination 2015*. [↑](#footnote-ref-2)
2. This is the average rate for Commonwealth 10-year bonds for the period 4 January to 3 February 2021 and sourced from the RBA’s “Capital Market yield – Government Bonds – Daily F2” (https://www.rba.gov.au/statistics/tables/ and viewed 4 February 2021). [↑](#footnote-ref-3)
3. The Reserve Bank of Australia’s Statement on Monetary Policy – November 2020 (page 1) forecast an inflation rate of 1.5 per cent. [↑](#footnote-ref-4)