**EXPLANATORY STATEMENT**

Approved by the Australian Communications and Media Authority

*Radiocommunications Act 1992*

***Radiocommunications (Spectrum Re-allocation – 3.4 GHz and 3.7 GHz Bands) Declaration 2022***

**Authority**

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Spectrum Re-allocation – 3.4 GHz and 3.7 GHz Bands) Declaration 2022* (**the instrument**) under subsection 153B(1) of the *Radiocommunications Act 1992* (**the Act**).

Part 3.6 of the Act provides for the re-allocation of encumbered spectrum. Under section 153B of the Act, the ACMA may make a declaration that one or more specified parts of the spectrum are subject to re-allocation in relation to a specified period (**the re-allocation period**) and, for each part, with respect to one or more areas.

A spectrum re-allocation declaration may provide that the part or parts of the spectrum should be re-allocated by issuing spectrum or apparatus licences or a combination of both (see subsection 153B(6) of the Act). It must also specify the re-allocation period (after which affected incumbent apparatus licences in that part of the spectrum will be automatically cancelled (see section 153H of the Act)) and the re-allocation deadline (before which at least one spectrum licence is to be allocated (see section 153K of the Act)).

**Purpose and operation of the instrument**

The purpose of the instrument is to declare the following parts of the radiofrequency spectrum (**the 3.4 GHz and 3.7 GHz bands**) are subject to re-allocation by the ACMA, by issuing spectrum licences:

* 3400 MHz to 3425 MHz;
* 3425 MHz to 3442.5 MHz;
* 3475 MHz to 3492.5 MHz;
* 3492.5 MHz to 3510 MHz;
* 3510 MHz to 3542.5 MHz;
* 3542.5 MHz to 3575 MHz;
* 3700 MHz to 3750 MHz;
* 3750 MHz to 3800 MHz.

Each part of the spectrum is declared with respect to one or more of the named areas listed in column 1 of the table in Schedule 1 to the instrument. This enables the ACMA to allocate spectrum licences in the 3.4 GHz and 3.7 GHz bands in these areas, including parts of the bands where apparatus licences have been issued.

The re-allocation period for the instrument is the period of 5 years beginning at the start of the day after the instrument commences. The re-allocation deadline for the declaration is the end of the re-allocation period.

Mid-band radiofrequency spectrum, including in the 3.4 GHz to 3.8 GHz frequency band, has been identified globally as optimal for the delivery of 5G wireless broadband (**WBB**) services. Consequently, there has been increased demand in Australia for greater, more efficient access to contiguous parts of this spectrum.

Presently, large parts of this spectrum, including the 3.4 GHz and 3.7 GHz bands, are not being used efficiently, or in some cases, at all. Spectrum in the 3.4 GHz to 3.8 GHz frequency band is subject to a mix of apparatus and spectrum licensing arrangements authorising a variety of services, including WBB, fixed satellite, radiolocation and amateur services. As a result, licensees are unable to secure larger, contiguous spectrum holdings for the delivery of services.

The *Radiocommunications (Ministerial Policy Statement – 3.4–4.0 GHz) Instrument 2022* (**the Policy Statement**) has been made under section 28B of the Act. In accordance with section 28C of the Act, in performing its spectrum management functions, and exercising its spectrum management powers, the ACMAmust have regard to any relevant statement made under section 28B. The Policy Statement provides that it is a government communications policy objective in relation to the 3.4 GHz to 4 GHz frequency band:

* to support the deployment of new and innovative technology, including 5G;
* to support a range of use cases and users;
* to support digital connectivity and investment in regional Australia; and
* to promote competitive markets.

The Policy Statement provides that, for these policy objectives:

* spectrum management settings established by the ACMA should support the deployment of new and innovative technology, including the ongoing deployment of 5G;
* 4G and 5G services, alongside incumbent fixed satellite and point-to-point services, can be supported by the ACMA administering efficient spectrum access arrangements that support a range of use cases and users, including an appropriate balance between wide-area and customised local services;
* spectrum management settings by the ACMA should take into account the needs of use cases and users in order to support the provision of important services outside the large metropolitan and regional centres; and
* decisions by the ACMA about the planning and allocation of the 3.4 GHz to 4 GHz frequency band should take account of the importance of supporting competition in relevant markets.

The ACMA has been working towards consolidating the arrangements in the 3.4 GHz to 3.8 GHz frequency band (referred to as defragmentation) since 2019. The spectrum adjacent to the 3.4 GHz and 3.7 GHz bands, both in frequency and geographic dimensions, is currently spectrum licensed. Clearing and relocating incumbent apparatus licensees from the 3.4 GHz and 3.7 GHz bands, and conducting a price-based allocation (auction) of spectrum licences in those bands, will remove a key regulatory barrier to the defragmentation of licensing arrangements in the 3.4 GHz to 3.8 GHz frequency band and make more spectrum available for 5G services.

The ACMA considers that spectrum licensing will deliver the most efficient allocation and use of the spectrum in the 3.4 GHz to 3.8 GHz frequency band. Spectrum licences provide licensees with the flexibility to encourage them to be innovative and to invest in infrastructure.

The ACMA intends to conduct an auction for spectrum licences in the following frequency bands:

* 3400 MHz to 3442.5 MHz and 3475 MHz to 3575 MHz, in respect of different major regional centres and regional areas across the bands (**regional 3.4 GHz band**); and
* 3700 MHz to 3800 MHz, in respect of different metropolitan and regional areas across the band (**3.7 GHz band**).

The ACMA will conduct the allocation process within the framework of the Act, this instrument and the Policy Statement.

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**).

In accordance with item 55 of the table at section 12 of the *Legislation (Exemption and Other Matters) Regulation 2015* (**the Regulation**), the instrument is not subject to sunsetting under Part 4 of Chapter 3 of the LA. According to the explanatory statement for the regulation, commercial certainty would be undermined by the sunsetting of the instrument. There are a number of factors that point to the benefit of commercial certainty being undermined if the instrument were to sunset, and which suggest that the instrument is intended to be enduring. In particular:

* The use of the radiofrequency spectrum is of substantial value and importance to Australia. Many functions of industry, commerce, medicine, entertainment and social interaction rely on the use of the spectrum. This spectrum is important for WBB and other uses which contribute significantly to Australian society and the Australian economy.
* This instrument declares that the 3.4 GHz and 3.7 GHz bands be re-allocated by issuing spectrum licences. The effect of this instrument is to commence a process for the re-allocation of valuable spectrum, some of which is currently in use by apparatus licensees, by issuing spectrum licences. Providers of WBB and other services rely both on access to spectrum and the deployment of significant infrastructure, especially the radiocommunications transmitters used to provide these services. Accordingly, substantial investment decisions may be made in reliance on the instrument’s continuing effect. The decisions in relation to those investments may be undermined by the sunsetting of the instrument.
* The spectrum covered by the instrument may not all be allocated at the first opportunity; for any unsold spectrum, there may be a future allocation process. As any spectrum licences allocated at the first opportunity may have long licence periods (up to 20 years), future allocation or renewal processes could take place some substantial time after the first allocation process.
* The allocation of spectrum licences will result in the cancellation of the existing apparatus licences, from the end of the re-allocation period (section 153H of the Act). Existing apparatus licensees will rely on the re-allocation declaration to know when their licences will be cancelled.
* Once the ACMA begins allocating spectrum licences as a result of the instrument, the ACMA must not revoke the instrument (subsection 153J(1) of the Act), and has limited powers to vary the instrument (subsections 153J(2)and (2A) of the Act). The only way for a spectrum re-allocation declaration to be revoked under the Act is if the ACMA has not allocated any spectrum licences before the re-allocation deadline (section 153K of the Act).

Parliament continues to have oversight of the instrument, as it is subject to disallowance. It also has oversight through other mechanisms (e.g., the relevant Senate Estimates Committee).

**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) provisions of any Act as in force at a particular time, or as in force from time to time. Subsection 314A(2) 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 other instrument or writing as in force or existing at a particular time or from time to time.

The instrument incorporates the Australian Spectrum Map Grid 2012 as existing at the time the instrument commenced, published by the ACMA and available, free of charge, on the ACMA’s website at [www.acma.gov.au](http://www.acma.gov.au).

The following Acts and legislative instruments are referred to in the instrument, but are not incorporated by reference:

* the Act;
* the *Acts Interpretation Act 1901*;
* the LA.

The Acts listed above are available, free of charge, from the Federal Register of Legislation at [www.legislation.gov.au](http://www.legislation.gov.au).

**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.

*Optimising arrangements for the 3400 MHz to 3575 MHz frequency band*

In April 2019, the ACMA released the [Optimising arrangements for the 3400—3575 MHz band Options paper](https://www.acma.gov.au/consultations/2019-08/optimising-3400-3575-mhz-band-consultation-122019) (**the 3400 MHz options pape**r). The 3400 MHz options paper acknowledged that the mix of spectrum and apparatus licensing types across the 3400 MHz to 3575 MHz frequency band had impeded commercial negotiations to facilitate a move to defragmentation. The 3400 MHz options paper also identified options for making more of the 3400 MHz to 3575 MHz frequency band available for WBB use.

*Replanning the 3700 MHz to 4200 MHz frequency band*

In September 2019, the ACMA released the [Planning of the 3700-4200 MHz band Discussion paper](https://www.acma.gov.au/consultations/2019-09/planning-3700-4200-mhz-band-consultation-272019%22%20/t%20%22_blank) (**the 3700 MHz discussion paper**). Based on submissions made to the 3700 MHz discussion paper, in July 2020 the ACMA released the [Replanning of the 3700–4200 MHz band Options paper](https://www.acma.gov.au/consultations/2020-07/planning-options-3700-4200-mhz-band-consultation-222020%22%20/t%20%22_blank) (**the 3700 MHz options paper**), making a case to review and potentially change the spectrum management framework in the 3700 MHz to 4200 MHz frequency band.

*Replanning Decisions*

Following the release of the 3400 MHz options paper, the 3700 MHz discussion paper and the 3700 MHz options paper, the ACMA released the following:

* in November 2019, the [Optimising arrangements for the 3400-3575 MHz band Planning decisions and preliminary views paper](https://www.acma.gov.au/consultations/2019-08/optimising-3400-3575-mhz-band-consultation-122019%22%20/t%20%22_blank) (**the 3400 MHz decisions paper**);
* in January 2021, the [Replanning the 3700–4200 MHz band Outcomes paper](https://www.acma.gov.au/sites/default/files/2021-01/Replanning%20the%203700-4200%20MHz%20band_Outcomes%20paper.docx%22%20/t%20%22_blank), January 2021 (**the 3700 MHz outcomes paper**);
* in December 2021, the [Planning for wireless broadband in urban areas in 3400-3475 MHz Outcomes paper](https://www.acma.gov.au/consultations/2021-08/planning-wireless-broadband-use-urban-areas-3400-3475-mhz-band-consultation-312021%22%20/t%20%22_blank) (**the Urban Excise outcomes paper**).

The release of these papers coincided with consideration of technical arrangements for the 3.4 GHz and 3.7 GHz bands. The alignment between these processes provided the ACMA with the opportunity to holistically assess spectrum licensing arrangements across the broader 3.4 GHz to 3.8 GHz frequency band. Therefore, the ACMA consulted again on a modification to the preliminary decisions contained within the 3400 MHz decisions paper, the 3700 MHz outcomes paper and the Urban Excise outcomes paper in March 2022, alongside consultation on the terms of this instrument.

*Instrument*

On 2 March 2022, the ACMA published the [Proposed spectrum re-allocation declaration for the 3.4 GHz and 3.7 GHz bands consultation paper](https://www.acma.gov.au/consultations/2022-03/proposed-spectrum-re-allocation-declaration-34-ghz-and-37-ghz-bands) (**the re-allocation consultation paper**). The ACMA invited views on planning arrangements in the 3.4 GHz and 3.7 GHz bands and the terms of a proposed re-allocation declaration to be submitted by 4 May 2022. The ACMA also sought preliminary views on additional matters including licence term, lot configuration and auction methodology. On 29 March 2022, the ACMA held an industry “tune-up” with stakeholders about the re-allocation options outlined in the re-allocation consultation paper as well as the additional matters.

The ACMA received 31 submissions to this consultation. After considering submissions, the ACMA made the re-allocation declaration.

In general, submissions supported the ACMA’s proposals. However:

* some stakeholders wanted to maximise the amount of spectrum available under apparatus licences, minimise the impact on incumbent apparatus licences and ensure part of the 3400-3800 MHz frequency range (which supports both 4G and 5G technologies) was available for apparatus licensed use;
* some stakeholders wanted to maximise the amount of spectrum available under spectrum licences, and to minimise the reduction of spectrum utility caused by boundaries (frequency and geographic) between spectrum licences and apparatus licences. These stakeholders also suggested the same total amount of area (in both regional and metro areas) be subject to spectrum licensing across the entire 3400-3800 MHz frequency range, to assist in consolidation of the new spectrum licences with existing spectrum licences;
* some stakeholders submitted that the ACMA’s proposed re-allocation period of five years should be shorter (in some cases, as short as two years), and some suggested delaying the allocation of some parts of the spectrum.

After considering these submissions, the ACMA, adjusted its initial proposal so as to:

* not include in the instrument the 3400 MHz to 3475 MHz frequency band in some metropolitan areas, meaning the spectrum will not be available for spectrum licences in these areas. Instead, the spectrum will be available for apparatus licences;
* include in the instrument the 3750 MHz to 3800 MHz band in regional areas of New South Wales, Queensland, South Australia, Victoria and Western Australia, and in the urban centres of Ballarat, Bendigo and Toowoomba, meaning the spectrum will be available for spectrum licences in these areas.

The ACMA considered that these changes provided for the most efficient use of the spectrum, minimising the impact of boundaries between spectrum licences and apparatus licences, and reducing the impact of the instrument on existing apparatus licensees. In order to further reduce that impact, the ACMA included a five year re-allocation period for all parts of the spectrum covered by the instrument. This will also allow for the possibility of some delay in the allocation process, as some stakeholders requested, if that is later deemed necessary or appropriate.

**Regulatory impact assessment**

The Office of Best Practice Regulation (**OBPR**) confirmed that a Regulation Impact Statement was not required for the instrument on the ground that it is unlikely to have more than a minor regulatory impact (OBLR reference OBPR22-01921). The ACMA previously engaged with OBPR in relation to the 3400 MHz options paper (OBPR reference 25773) and the 3700 MHz options paper (OBPR reference 25280).

**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.

***Overview of the instrument***

The purpose of the instrument is to declare that the following parts of the radiofrequency spectrum are subject to re-allocation by the ACMA, by issuing spectrum licences:

* 3400 MHz to 3425 MHz;
* 3425 MHz to 3442.5 MHz;
* 3475 MHz to 3492.5 MHz;
* 3492.5 MHz to 3510 MHz;
* 3510 MHz to 3542.5 MHz;
* 3542.5 MHz to 3575 MHz;
* 3700 MHz to 3750 MHz;
* 3750 MHz to 3800 MHz.

Each part of the spectrum is declared with respect to one or more of the named areas listed in column 1 of the table in Schedule 1 to the instrument. This enables the ACMA to allocate spectrum licences in the 3.4 GHz and 3.7 GHz bands in these areas, including parts of the bands where apparatus licences have been issued.

***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 Re-allocation – 3.4 GHz and 3.7 GHz Bands) Declaration 2022***

**Section 1 Name**

Section 1 provides for the instrument to be cited as the *Radiocommunications (Spectrum Re-allocation – 3.4 GHz and 3.7 GHz Bands) Declaration 2022*.

**Section 2 Commencement**

Section 2 provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at [www.legislation.gov.au](http://www.legislation.gov.au).

**Section 3 Authority**

Section 3 identifies the provision of the Act that authorises the making of the instrument, namely subsection 153B(1) of the Act.

**Section 4 Interpretation**

Subsection 4(1) defines key expressions used in the instrument.

In particular, it defines the Hierarchical Cell Identification Scheme (**HCIS**), which is the system used by ACMA to define geographic areas for radiocommunications licensing, by reference to the Australian Spectrum Map Grid 2012, a document published by the ACMA and available, free of charge, on the ACMA’s website. The alphanumerically coded HCIS cells are used in Schedule 1 to define the geographic areas with respect to which parts of the spectrum are declared to be subject to re-allocation by issuing spectrum licences.

Subsection 4(2) provides that each reference to a part of the spectrum includes all frequencies greater than the lower frequency, up to and including the higher frequency. This means the part of the spectrum does not include the lower frequency.

**Section 5 References to other instruments**

Section 5 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 refence to that other instrument or writing as in force, or existing, from time to time.

A contrary intention appears in relation to the Australian Spectrum Map Grid 2012, which is incorporated by reference as existing at the time the instrument commenced.

**Section 6 Re-allocation period and re-allocation deadline**

Section 6 provides that:

* the ***re-allocation period*** is the period of 5 years beginning at the start of the day after the instrument commences. At the end of the re-allocation period, any apparatus licences in the parts of the spectrum declared to be subject to re-allocation will be cancelled under section 153H of the Act.
* the ***re-allocation deadline*** occurs at the end of the re-allocation period. The re-allocation deadline sets the time by which at least one spectrum licence must be issued, or the declaration will be revoked under section 153K of the Act.

**Section 7 Spectrum re-allocation**

Section 7 declares the parts of the spectrum in the 3.4 GHz and 3.7 GHz bands that are subject to re-allocation under Part 3.6 of the Act. Each part is declared to be subject to re-allocation by issuing spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act. Each Part is declared with respect to particular named areas. Each area has been chosen on the basis that it will allow for continuity between existing spectrum licences and the new spectrum licences to be allocated in the 3.4 and 3.7 GHz bands.

**Schedule 1–Named areas**

Schedule 1 defines the areas used in section 7. The areas are defined by using HCIS identifiers. Under the HCIS, an area is defined by referring to a set of identifiers which collectively correspond to a single area on the Australian Spectrum Map Grid. The Australian Spectrum Map Grid (**ASMG**) is described in more detail, including the use of geographic coordinates to define the outer boundary of the ASMG, in the Australian Spectrum Map Grid 2012, available free of charge from the ACMA’s website.

The ASMG divides the Australian land mass into a grid of squares (cells). There are four levels to the HCIS that are typically used in relation to spectrum licences, with the side lengths of the largest to smallest cells being, respectively, 3 degrees, 1 degree, 15 minutes and 5 minutes of arc. The HCIS names the cells in this tiered structure, with cells of each size given a unique identifier name. Under this system, the area for re-allocation of a part of the spectrum is comprised of a collection of unique identifiers that cover the required geographic area on the ASMG. Spatial data files available from the ACMA’s website may be used to generate a map of an area defined by a set of HCIS identifiers with geographic information systems software.