

EXPLANATORY STATEMENT

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012

Issued by the authority of the Minister for Broadband, Communications and the Digital Economy

Background

Under section 60 of the *Radiocommunications Act 1992* (the Act), the Australian Communications and Media Authority (the ACMA) is required to determine procedures to be applied in allocating spectrum licences. It is necessary for the ACMA to apply such procedures in circumstances where:

- a re-allocation declaration has been made by the Minister under section 153B of the Act, which initiates the process for re-allocating spectrum in the frequency bands named in such a declaration, and that declaration states that the spectrum should be re-allocated by means of issuing spectrum licences (section 153L refers);
- a designation notice has been issued by the Minister under section 36 of the Act and a part or parts of the spectrum identified in the notice are considered to be unencumbered, necessitating the preparation of a marketing plan under section 39 of the Act; or
- one or more spectrum licences are to be re-issued under Division 4 of Part 3.2 of the Act, other than re-issue to the same licensee under section 82 of the Act.

Under subsection 60(5) of the Act, the ACMA is authorised to determine procedures under subsection 60(1) that impose limits on the aggregate of the parts of the spectrum that may be used by any one person or specified person, or members of a specified group of persons, as a result of the allocation of spectrum licences under Subdivision B of Part 3.2 of the Act. However, subsection 60(9) of the Act provides that this power to determine limits may only be exercised if the ACMA is directed to do so by the Minister under subsection 60(10) of the Act.

Subsection 60(10) of the Act allows the Minister to give written directions to the ACMA in relation to the exercise of its power to determine procedures imposing a limit mentioned in subsection 60(5) of the Act.

Subsection 60(6) of the Act sets out the manner in which limits imposed under subsection 60(5) of the Act may be expressed to apply, including by reference to a specified part of the spectrum, area or population reach.

Where the Minister gives the ACMA a written direction under subsection 60(10) of the Act in relation to its power to impose limits under subsection 60(5) of the Act, the instrument will not be subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. This is because item 41 in subsection 44(2) of the *Legislative Instruments Act 2003* provides that ministerial directions to any person or body will not be subject to disallowance unless the instrument is subject to disallowance under its enabling legislation. The *Radiocommunications Act 1992* does not provide for a direction given by the Minister under subsection 60(10) to be subject to disallowance.

Purpose

On 24 June 2010, the Minister for Broadband, Communications and the Digital Economy (Minister) announced the Australian Government's decision to release 126 MHz of broadcasting spectrum in the range 694-820MHz as a digital dividend.

An auction is being planned to sell spectrum from the digital dividend (700MHz) band along with spectrum from the 2.5GHz band through a single process at the end of 2012.

On 1 November 2011 the Minister formally initiated the process for re-allocating spectrum in the 700MHz and 2.5GHz bands to allow for new uses beyond broadcasting, by making the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011* and the *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2011* under section 153B of the Act. These instruments declare spectrum in the 700MHz and 2.5GHz bands subject to re-allocation by issuing spectrum licences.

The 700MHz and 2.5GHz bands are important for the evolution of mobile networks in Australia. These bands have been harmonised internationally for use for Long Term Evolution (LTE) technology – the next generation of mobile communications services. LTE technology combined with larger blocks of spectrum (2x20MHz blocks are optimal) are expected to offer greater efficiencies and cost savings for operators, and deliver higher data carrying capacity and faster service speeds. Telstra, Optus and Vodafone Hutchison Australia (VHA) have indicated their intention to upgrade their networks to LTE.

There is increasing demand for new spectrum in order to roll-out LTE networks and gain access to the larger bandwidths necessary to meet the ever increasing demand for mobile data services. This increasing demand is the result of increasing use of mobile consumer devices with internet connectivity (such as smart phones, tablets and laptops). The 700MHz and 2.5GHz spectrum will be central to meeting this demand going forward.

Mobile broadband networks operate best using a combination of high band spectrum for additional capacity and low band spectrum for coverage. The existing mobile network operators and any potential new market entrant are likely to seek spectrum from both the 700MHz and 2.5GHz bands in the upcoming auction in order to best design their new networks.

Competition limits are being imposed on spectrum in both the 700MHz and 2.5GHz bands to prevent either band being monopolised. A monopoly will cause the network architecture to be inefficient, with subsequent negative impact on consumers in terms of service availability, quality and pricing.

The competition limits have been structured to provide a level playing field for the three bidders most likely to participate in the auction, while not precluding a new entrant.

The limits have been set bearing in mind the characteristics of the technology most likely to be deployed (LTE), particularly the optimal spectrum block size of 2x20MHz.

The Minister sought advice from the Australian Competition and Consumer Commission (the ACCC) on the need for, and impact of, competition limits for the 700MHz and the 2.5GHz radiofrequency spectrum auctions, by letter dated 2 June 2011. The ACCC, after liaising with the ACMA in relation to the Minister's request, provided advice to the Minister on 27 July 2011.

The limits that are being set take into account, and are consistent with, the advice provided by the ACCC, in consultation with the ACMA.

Notes on Clauses

Clause 1

Clause 1 provides for the citation of the Direction as the *Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012*.

Clause 2

Clause 2 provides that the Direction will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Clause 3

Subclause 3(1) sets out a number of definitions for the purpose of the Direction. Some definitions are self-explanatory, and those that are not are noted below.

The intention of the Direction is to prevent any one person or specified groups of persons acquiring spectrum at the forthcoming allocation of spectrum licences in the 700MHz frequency band so that, as a result of that allocation, they hold no more than 2x20MHz of the total 2x45MHz that is being made available for allocation. To ensure this objective is met and not circumvented by persons acting on behalf of others, the Direction imposes the limits on both persons and specified groups of persons.

‘Specified group of persons’ is defined as an applicant for a spectrum licence and all associates of the applicant. ‘Associate’ is defined for the purposes of the ‘specified group of persons’ definition and includes persons who have specified relationships with the applicant, including where the people are parties to a ‘relevant agreement’ of the type described in paragraph (c) of the associate definition.

‘Relevant agreement’ is defined for the purposes of the ‘associate’ definition and captures agreements, arrangements or understandings irrespective of their level of formality or legal effect. Persons will be associates if they are parties to a relevant agreement of a particular type, as described in paragraph (c) of the associate definition. The types of relevant agreements captured by paragraph (c) of the associate definition are those which relate to the use by a party to the agreement of any part of the spectrum covered by the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011* (the re-allocation declaration), or that relates to the acquisition of a spectrum licence for any part of the spectrum to which the re-allocation declaration applies.

The concept of persons being associates through a relevant agreement of a particular type is designed to cover situations where there may otherwise be no formal associate relationship between them but a person (the first person) has agreed that another person would acquire spectrum ostensibly in their own right, but in actuality the acquisition would be for the benefit of the first person.

A relevant agreement may include an agreement where:

- one party to the agreement would acquire a spectrum licence and then use it in a particular way or allow the other party to use that spectrum; or

- one party would acquire a spectrum licence but agree to not use that spectrum or not allow any other person to use that spectrum; or
- one party would acquire a spectrum licence and agree to allow the other party to later acquire that spectrum licence, or alternatively to not allow anyone else to acquire the licence.

As explained in the notes on clause 4 below, the Direction only applies to the allocation of the identified spectrum. Once the ACMA has allocated the relevant spectrum, the direction will cease to have effect. Therefore, a person will only be considered an ‘associate’ by virtue of a relevant agreement if that agreement is in existence at the time of the allocation of spectrum (i.e. at the time of the auction).

The Direction would not restrict future trading in spectrum by a spectrum licensee pursuant to any other agreement entered into after the spectrum has been allocated, although such trading will be subject to the acquisition provisions of the *Competition and Consumer Act 2010* (section 50 refers).

Agreements between carriers provided for by or under the *Telecommunications Act 1997* or Part XIC of the *Competition and Consumer Act 2010* are excluded from the concept of a relevant agreement, so that a person who is party to an access agreement under these legislative frameworks would not be considered an associate on the basis of that agreement alone.

‘Designated area’ means the specified area described in subclause 4(2) of the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011*, being the National Area (as defined in the declaration), but excluding the Mid West Radio Quiet Zone (as defined in the declaration).

Subclause 3(2) contains a provision which clarifies the end-points of the frequency ranges specified for each frequency band identified in subparagraphs 4(1)(a) and (b) of the Direction. Subclause 3(2) confirms that each frequency band includes all frequencies that are greater than the lower frequency, up to and including the higher frequency. The practice of including the higher, but not the lower number, when identifying a range of frequencies is used to prevent cases of frequency band overlap.

Subclause 3(3) provides that where 2 or more specified groups of persons have 1 member in common, they will be taken to be 1 specified group of persons for the purposes of the Direction. This means if an applicant or an associate is a member of 2 or more specified groups, those groups are taken to be 1 specified group of persons.

A person who is an associate of an applicant for a spectrum licence, and who is also an associate of one or more other applicants for a spectrum licence, is a member in common for 2 specified groups of persons. For example, if a person was a director of one applicant for a spectrum licence, whilst also being a director of another applicant for a spectrum licence, both the applicants in question and all of their associates would be taken to be 1 specified group of persons. The limits set out in clause 4 would apply to all such persons. For example, companies subject to a dual-listed company arrangement (as defined in section 125-60 of the *Income Tax Assessment Act 1997*) would typically have 1 or more directors in common. Where applicant companies subject to a dual-listed company arrangement do have directors in common, those directors would be members in common of each specified group under

subclause 3(3) of the Direction, and those companies and their associates would be taken to be 1 specified group of persons for the purposes of the Direction.

Persons that are connected in some way, but not through a relationship of a type described in the associate definition, would not by virtue of that connection alone be associates of each other for the purposes of the Direction. Similarly, where a person has a connection with 2 or more applicants for spectrum licences, but is not an associate as defined by the Direction, that person would not be a member in common for the 2 specified groups of persons. For example, where 2 applicants have the same person acting as a consultant or adviser for them in respect of the allocation of spectrum licences, the person acting as consultant or adviser will only be an associate, and therefore a member in common, if the person has a relationship with each applicant of a type described in the definition of 'associate'.

Clause 4

Clause 4 sets out the quantum limits that are to be included in the spectrum allocation procedures.

This clause directs the ACMA to determine procedures under subsection 60(1) of the Act that impose limits to ensure that, as a result of the allocation of the 2x45MHz parts of the 700MHz frequency band provided for in the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011*, no person or specified group of persons may use more than:

- 20MHz of the spectrum available in the designated area in the frequency band 703MHz to 748MHz; and
- 20MHz of the spectrum available in the designated area in the frequency band 758MHz to 803MHz.

The limits, as described above, fit within the parameters of the types of limits that may be imposed in accordance with subsections 60(5) and 60(6) of the Act.

This Direction only applies in relation to the ACMA's allocation of the 2x45MHz parts of the 700MHz spectrum bands specified in the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011*. Once the spectrum is allocated by the ACMA, the Direction will be spent.