

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012

Radiocommunications Act 1992

Purpose

The *Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012* (the **Determination**) sets out details of the procedures to be applied in allocating spectrum licences in the 700 MHz and 2.5 GHz bands. These licences will be allocated in a single auction using the Combinatorial Clock Auction (the **CCA**) methodology.

Legislative Provisions

The Determination is made under sections 60 and 294 of the *Radiocommunications Act 1992* (the **Act**). Under section 60, the Australian Communications and Media Authority (the **ACMA**) must determine, in writing, the procedures to be applied in allocating spectrum licences by auction, and under section 294 the ACMA may make determinations fixing spectrum access charges payable by licensees for issuing spectrum licences, and specifying the times when the charges are payable.

Background

Changes to the 700 MHz and 2.5 GHz bands are occurring in separate, but parallel, processes that will enable spectrum in both of these bands to become available at similar times.

Spectrum in the 700 MHz band is being freed up as television services in Australia move from analog to digital-only broadcasts. Digital broadcasting technology uses bandwidth far more efficiently than equivalent analog services, and will require much less spectrum once the current period of analog and digital television simulcasting ends (analog switch-off). The remaining digital broadcasting channels will be 'restacked', or re-tuned, to frequencies below channel 52 in the UHF band, leaving a single contiguous block of spectrum (known as the 'digital dividend') in the 700 MHz spectrum clear for re-allocation.

In June 2010, the Minister of Broadband, Communications and the Digital Economy, Senator Stephen Conroy (the **Minister**), publicly announced that the size of the digital dividend would be 126 MHz, and would fall in the frequency range from 694 MHz to 820 MHz (the **700 MHz band**). On 9 July 2010, the Minister directed the ACMA to reallocate the digital dividend band under Part 3.6 of the Act.

Through a separate process, part of the 2.5 GHz band is being re-configured in a way that is technology flexible but will be optimised for wireless access services (**WAS**), including mobile telephony and broadband. This will align the use of the band in Australia with globally harmonised arrangements in place for the 2.5 GHz band. A large number of countries have already adopted, or intend to adopt, the use of part or the entire 2.5 GHz band for WAS. These developments follow international designation of the band to allow the use of International Mobile Telecommunications (**IMT**) technologies, including WAS.

Aligning the 2.5 GHz band with existing globally harmonised arrangements is expected to provide significant benefits for the Australian public. As well as additional spectrum becoming available for

mobile communications, economies of scale factors will lower the cost of producing mobile equipment, leading to cheaper devices for end users. There will also be greater capacity for international mobile telephony roaming as more countries around the world adopt the same harmonised band standard.

Although the ACMA does not intend to designate the 700 MHz or 2.5 GHz bands for specific categories of use, spectrum in both bands is most likely to be used to deploy or extend mobile telecommunications and broadband using advanced wireless services such as 4G LTE (Long Term Evolution technology). The recent rapid take-up of mobile devices, especially smart phones and tablet computers, has led to an exponential growth in wireless data traffic. This in turn has substantially increased demand for suitable spectrum to support and improve the quality of mobile services.

On 2 November 2011, following recommendations from the ACMA, the Minister made declarations that specific parts of the spectrum in both the 700 MHz and 2.5 GHz bands would be subject to re-allocation by spectrum licensing under section 153B of the Act. Two blocks of spectrum in each band are to be reallocated. In the 700 MHz this corresponds to the frequency ranges 703–748 MHz and 758–803 MHz. In the 2.5 GHz band, spectrum between 2500–2570 MHz and 2620–2690 MHz will be reallocated. All spectrum included in the declarations will be allocated in all parts of Australia, with the exception of the Mid West Radio Quiet Zone (**RQZ**) in Western Australia. The RQZ has been excised from this re-allocation process to protect scientific radio-astronomy observatories on this site from radiofrequency interference. The Minister has also declared that there will be delayed access to Perth and a surrounding region in the 2.5 GHz band.

The specific parts of the spectrum in each band declared for re-allocation are set out in two spectrum re-allocation declarations (*Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011* and *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2011*). These declarations also provide details about the time by which each re-allocation must be completed.

Spectrum in both bands will be allocated together in a single auction using the CCA methodology. The ACMA considers that a single auction is likely to maximise the efficiency of each allocation and will offer the greatest possible flexibility to attract prospective new spectrum licensees. The combined allocation will accommodate bidders who only want to acquire spectrum in one of the two bands. It will also give bidders the flexibility to acquire spectrum in both bands simultaneously to suit their business needs. The ability to acquire a package of spectrum from each band will be particularly important for bidders who regard the 700 MHz and 2.5 GHz bands as having complementary signal propagation characteristics. Under these circumstances, bidders may value the package of mixed spectrum more than the sum of its constituent parts; the single auction will allow bidders to express this combined worth in their bids, with the certainty that they will not end up winning only part of a desired package of spectrum.

Allocation Determination Operation

The Determination is one of a set of legislative instruments that gives effect to the Minister's spectrum re-allocation declarations relating to spectrum in the 700 MHz and 2.5 GHz bands. Under section 60 of the Act, the Determination makes provision for how this spectrum will be allocated by a price-based method, namely an auction.

This legislative instrument sets out in detail the procedures that will be used to conduct the auction. These include the requirements and responsibilities of both applicants and the ACMA throughout all stages of the allocation process. It also sets out clear rules to deter collusive behaviour and sets the potential consequences for breaching these or other parts of the Determination.

The allocation procedures describe the necessary application and registration process for parties to become eligible to participate and bid for spectrum at auction. These instructions include an explanation of all required documentation and fees.

Rules governing how applicants can bid on spectrum in the auction are also provided. The ACMA will auction spectrum divided into lots as described in marketing plans for each of the two bands. Each lot is defined by a geographic boundary and frequency bandwidth. The auction will be held via a secure online program using the CCA methodology. This style of auction consists of two major stages: an allocation stage, which determines how spectrum lots will be distributed to successful bidders, and an assignment stage, which determines the location of spectrum lots in each reallocated band.

Spectrum licence limits set by the Minister will apply in the course of this allocation process. These have the effect of capping the total amount of spectrum in each band that a single bidder can acquire. In the 700 MHz band, a bidder will be limited to a maximum of 2 x 25 MHz nationally, while the maximum spectrum a bidder may obtain in the 2.5 GHz band is 2 x 40 MHz in each region as defined in the *Radiocommunications Spectrum Marketing Plan (2.5 GHz Band) 2012*.

The Determination will also set out the financial obligations to be met by successful bidders before the ACMA can issue spectrum licences, and the procedure for the ACMA to return participation fees, held during the auction, to unsuccessful bidders.

Other legislative instruments have been created as part of requirements for reallocating spectrum in the 700 MHz and 2.5 GHz bands. These provide additional information about the auction and the spectrum licences that will be available for allocation.

Under section 39A of the Act, a separate marketing plan for each band has been prepared. These marketing plans specify the spectrum available and the conditions that will apply to its use under spectrum licences. The ACMA has also made a determination and advisory guidelines for each band, under sections 145 and 262 of the Act, respectively. This determination made under section 145 defines unacceptable interference levels that devices used under spectrum licences issued under the Determination must comply with. The advisory guidelines provide additional interference management measures and set out requirements for registering devices with the ACMA that will operate under spectrum licences in the 700 MHz and 2.5 GHz bands.

Consultation

The ACMA has consulted extensively with stakeholders about its plans for the re-allocation of the 700 MHz and 2.5 GHz bands generally, and on the Determination in particular.

In January 2010, the ACMA released the discussion paper, *Review of the 2.5 GHz band and long term arrangements for ENG*.¹ The purpose of the review was to determine the use of this band that would represent its highest value use. It also sought to identify long-term arrangements for ENG services that currently use this band. Such arrangements include finding alternative bands that could accommodate ENG services in the future.

The ACMA received a total of 42 written submissions in response to the discussion paper. Submissions were published on the ACMA's website (www.acma.gov.au). Stakeholder views expressed in these submissions have been taken into consideration in subsequent auction planning.

In October 2010, the ACMA published the discussion paper, *'Reallocation in the 700 MHz 'Digital Dividend' Band'*. This paper sought stakeholder views on key issues that would influence the ACMA's early considerations of band configuration, licence design and the method of allocating the 700 MHz band. As part of this consultation, the ACMA held an industry forum (*'Spectrum Tune-Up 2010: Digital*

¹ ENG refers to electronic news-gathering services. These services facilitate television broadcasting coverage of an event remotely located from a broadcasting studio (also known as outside broadcasting).

Dividend). The Tune-up covered Issues raised in the discussion paper and provided an opportunity for stakeholders to give direct feedback to the ACMA.

The ACMA received a total of 45 written submissions to this discussion paper. Stakeholder views expressed in these submissions have been taken into consideration in subsequent auction planning.

The ACMA consulted with potentially-affected apparatus licence holders and the public before making recommendations to the Minister under section 153F of the Act to specify parts of the 700 MHz and 2.5 GHz bands for re-allocation. In accordance with section 153G of the Act, and for each of the two bands, the ACMA prepared a draft spectrum re-allocation recommendation, published the terms of the recommendation, and sought comment from potentially-affected licensees in a joint consultation. The consultation ran from the start of June 2011 and concluded on 15 July 2011. Nine written submissions were received addressing the draft terms relating to one or both of the bands. All written submissions from this consultation are available on the ACMA's website (www.acma.gov.au). The ACMA had regard to the views expressed in these submissions when preparing its final recommendations to the Minister.

Stakeholder views were also taken into account as the Determination was developed. During the preparation of a draft version of the Determination, the ACMA held an industry forum (*'Digital Dividend Auction Tune-Up 2011'*), which presented stakeholders with detail on preliminary approaches being considered on several key parts of the spectrum auction planning. Presentations and details of this event are available on the ACMA's *engage* website (www.engage.acma.gov.au). The ACMA sought comment on these approaches and undertook preliminary consultation through ACMA's *engage* website to seek stakeholder views on key allocation issues, such as the auction rules, prohibited communication, and payment of fees and other amounts.

Draft versions of the instruments were subsequently released for detailed public consultation on 11 April 2012, together with the explanatory information paper *Draft allocation instruments for the allocation of spectrum in the 700 MHz and 2.5 GHz bands (the digital dividend auction)*. Revised drafts of the allocation determination and the 700 MHz band marketing plan, prepared following comments on the initial drafts, were released for a second round of consultation on 6 July 2012. A revised draft of the 2.5 GHz band marketing plan, along with further revised drafts of the allocation determination and 700 MHz band marketing plan, was released in a third round of public consultation on 31 August 2012.

The ACMA took the views of stakeholders into consideration during the revision of all allocation instruments for the digital dividend auction, including the final version of these instruments.

Regulation Impact

Prior to making the final Determination, the ACMA consulted with the Office of Best Practice Regulation (the **OBPR**) on the requirement for a Regulation Impact Statement (**RIS**) for this legislative instrument. The OBPR advised that the CCA (OBPR issue reference ID 13106) and the remaining parts of the Determination (OBPR issue reference ID13105) do not warrant the preparation of a RIS.

Documents incorporated into the Determination by reference or otherwise referred to

The Determination incorporates the following documents by reference, or otherwise refers to them:

- > *Australian Communications and Media Authority (Allocation Procedures - Reserve Prices) Direction No. 1 of 2012*
- > *Australian Communications and Media Authority (Allocation Procedures - Reserve Prices) Direction No. 2 of 2012*

- > *Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012 (as amended) and the Radiocommunications (Spectrum Licence Limits) Direction No. 2 of 2012 (as amended) (the **spectrum licence limits directions**)*
- > *Radiocommunications Spectrum Marketing Plan (700 MHz Band) 2012*
- > *Radiocommunications Spectrum Marketing Plan (2.5 GHz Band) 2012*
- > *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011*
- > *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2011*
- > *Radiocommunications Act 1992*
- > *Telecommunications Act 1997*
- > *Australian Communications and Media Authority Act 2005*
- > *A New Tax System (Australian Business Number) Act 1999*
- > *Corporations Act 2001*
- > *Competition and Consumer Act 2010*
- > *Banking Act 1959*
- > *Insurance Act 1973.*

These instruments and Acts can be found on the Australian Government's ComLaw website (<http://www.comlaw.gov.au/>).

Detailed Description of the Instrument

Details of the instrument are in Attachment A.

Statement of Compatibility with Human Rights

In accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the ACMA has prepared a Statement of Compatibility with Human Rights (the **Statement of Compatibility**) to consider the human rights implications of the Determination. The Statement of Compatibility concludes that the content of this legislative instrument does not raise any human rights issues and is therefore regarded as being compatible with human rights. The Statement of Compatibility prepared for this instrument is provided in Attachment B.

DETAILED DESCRIPTION OF THE INSTRUMENT**PART 1 PRELIMINARY**

This Part deals with the formal provisions of the *Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012* (the **Determination**) such as its purpose and when it will come into effect. It also sets out fundamental concepts for the auction, including how prospective applicants must submit application documents, and the approved method for making payments to the ACMA. Key terms used throughout the Determination are also defined.

Section 1.1 Name of determination

This section names the Determination as the *Radiocommunications (Spectrum Licence Allocation – Combinatorial Clock Auction) Determination 2012*.

Section 1.2 Commencement

The section provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 1.3 Purpose of determination

This section states that the purpose of the Determination is to set out the procedures by which spectrum licences for the parts of the spectrum referred to in of the Minister's re-allocation declarations (in the 700 MHz and 2.5 GHz bands) will be allocated by a combinatorial clock auction (**CCA**). These procedures cover all parts of the allocation process, including application, registration of bidders, withdrawal of applications, payment of fees and spectrum access charges, rules and requirements for participating in the auction and other matters.

Section 1.4 Definitions

This section defines terms used throughout this Determination to help the reader to understand this instrument. These are supplemented by further definitions in sections 1.5, 2.1, 2.2, 2.3, 3.1, 4.4, 5.1 and 6.6, and clause 24 of Schedule 1, which relate specifically to particular parts of the Determination.

This section also provides that a reference to time in the Determination is a reference to the legal time in Victoria.

Where a defined term is explained in more detail in this explanatory statement, a cross-reference to the relevant section is given below.

Affiliated: See section 2.3

Assignment round: See subsection 5.1(3) and Schedule 1, Part 4

Associate: See section 2.2. The definition of 'associate' incorporates the meaning given to this term in the spectrum licence limits directions for the 2.5 GHz band and 700 MHz band for this auction. The explanatory statement to each spectrum licence limits direction (as read in conjunction with the explanatory statement to its respective amending direction) provides further information on the definition of 'associate'. The explanatory statements can be found on the Australian Government's ComLaw website (<http://www.comlaw.gov.au/>).

Bidder: See section 4.19

Clock round: See Schedule 1, Part 1

Initial eligibility points: See sections 4.13 and 4.14

Lot rating: See section 4.6

Specified group of persons: See section 2.3

Supplementary round: See Schedule 1, Part 2

Section 1.5 Products and lots

This section defines terms and phrases that relate to the description of units of spectrum (**lots**) and groups of lots (**products**) that are being offered in the auction. The marketing plans referred to in this section are the *Radiocommunications Spectrum Marketing Plan (700 MHz Band) 2012* (the **700 MHz Marketing Plan**) and the *Radiocommunications Spectrum Marketing Plan (2.5 GHz Band) 2012* (the **2.5 GHz Marketing Plan**).

There are twelve products being offered in the auction. One product is a national (i.e. Australia-wide) allocation of 9 lots of 2 x 5 MHz in the 700 MHz Band. Eleven are regional allocations of 14 lots of 2 x 5 MHz in the 2.5 GHz Band.

Section 1.6 Lodgement of documents

This section sets out instructions for lodging documents with the ACMA, including the alternative means by which documents can be lodged. These instructions apply to any documents being lodged with the ACMA for the purpose of the allocation process under this Determination. They are intended to supplement section 4.7 (Lodging application), section 4.12 (Requirements for new application), section 4.13 (Lodging eligibility nomination form) and 4.14 (Eligibility payment or deed of financial security required for initial eligibility points).

Applicants may submit documents to the ACMA by email, fax or delivery to a physical address (including delivery by registered mail). Where documents are submitted by email, this section also describes the electronic file format that particular documents being lodged must be in (namely, Portable Document Format (PDF) for any document, Rich Text Format (RTF) for any document that is not a statutory declaration or a deed, or any other electronic format approved by the auction manager).

Where documents are lodged by fax, this section also describes the information that must be provided on a cover sheet to accompany the documents being lodged.

Section 1.7 Payment of amounts

This section explains the manner in which payments under the Determination may be made to the ACMA. Amounts can be paid to the ACMA by bank cheque or by electronic transfer and must be made in Australian currency.

Where an applicant pays an amount by bank cheque, the payment will have been made by the deadline specified in the Determination if the ACMA receives the bank cheque by that deadline.

Where an electronic transfer is used, the ACMA must receive from the applicant evidence (such as a transfer receipt) that an electronic transfer has been made for the full amount (see below for information about bank charges and government duties). An applicant will be taken to have made a payment by the specified deadline, provided the ACMA receives the full amount in the ACMA's nominated bank account within three days of the deadline and the applicant gives the ACMA the evidence that the transfer was made before the deadline. Where full payment is not received within three days, the payment will be taken to have been made if the applicant can show that it has taken all reasonable steps to ensure that the amount was transferred to the ACMA's nominated bank account by the due date.

This section also explains a payment will not be considered to have been paid in full where bank charges or government duties imposed on the payment reduce the amount to less than the amount

due. An applicant is responsible for ensuring that any bank charges or government duties imposed on a payment do not reduce the payment received by the ACMA to less than the full amount due.

Section 1.8 Statutory declaration for body corporate

This section explains that where this Determination requires an applicant to make a statutory declaration and the applicant is a body corporate, such a declaration must be made by a director or a secretary of that body corporate.

PART 2 LIMITS ON ALLOCATION OF SPECTRUM

Under the Act, the ACMA may determine the procedures to be applied in allocating spectrum licences, including imposing limits on the aggregate parts of the spectrum that can be used as a result of the allocation of spectrum licences which may be used by any one person, specified persons or any specified group of persons (see subsection 60(5) of the Act). These spectrum licence limits are commonly referred to as allocation limits, competition limits or spectrum caps.

Subsection 60(10) of the Act gives the Minister the power to give directions to the ACMA in relation to the exercise of this power to impose such limits on the total amount of spectrum that a person or specified group of persons can be licensed to use. The Minister has exercised this power and has directed the ACMA to impose spectrum licence limits for the allocation of the spectrum declared for re-allocation in the 700 MHz and 2.5 GHz bands. These limits are set out in the spectrum licence limits directions.²

According to the explanatory statements to the spectrum licence limits directions, the spectrum licence limits that the Minister has directed the ACMA to impose in respect of the spectrum in both the 700 MHz and 2.5 GHz bands are designed to prevent access to either band from being monopolised. According to the explanatory statements for the spectrum licence limits directions, they have been structured to provide a level playing field for the bidders most likely to participate in the auction, while not precluding a new entrant.

The provisions in this Part give effect to the spectrum licence limits directions by setting allocation limits that apply to ensure that a person or a specified group of persons does not, as a result of the allocation and issue of spectrum licenses under the Determination, have permission to use more than the specified amount of the spectrum.

In order to enforce these limits in a fair, balanced and robust allocation process, it is essential that the ACMA is able to identify affiliations between applicants. Applicants who are considered to be affiliated (according to the criteria in section 2.3 in the Determination), will be taken to be in a single 'specified group of persons' for the purposes of the allocation limits. That is, the allocation limits will apply to the affiliated applicants as if they were a single applicant, rather than separate applicants.

Under the Determination, the ACMA intends to prevent affiliated applicants from participating as separate bidders in the same auction (see explanation of the operation of section 4.9 below). This will serve two important purposes:

1. It will assist the ACMA to comply with the spectrum licence limits directions, by identifying any 'specified group of persons' and establishing procedures to prevent them bidding as separate entities.
2. It will reduce the potential for collusive or strategic gaming behaviour during the auction. An attempt by affiliated applicants to participate in the auction as separate bidders could be collusive behaviour (that is, arriving at an agreement so as to strategically circumvent the allocation limits). The presence of affiliated entities in an auction would also more generally

² These directions can be found on the Australian Government's ComLaw website (<http://www.comlaw.gov.au/>).

provide a richer field for collusion (given the connection between two or more of the bidding entities).

This Part sets out the allocation limits and explains the circumstances in which the applicant will be taken to be 'affiliated' with another person. Other parts of the Determination set out the specific procedures for the identification and treatment of affiliated applicants under this allocation process.

The provisions in Part 4 include robust procedures to identify and resolve any affiliations between applicants prior to the auction commencing. Part 5 Division 2 sets out procedures for affiliations that occur during the auction period, including an ongoing reporting requirement for applicants and bidders to report any suspected affiliation with another bidder immediately to the ACMA. This Part also makes provision for significant disincentives for bidders who form an affiliation during the auction. These disincentives are intended to deter such behaviour. They also complement the rules governing confidentiality in Part 3.

Part 6 Division 1 deals with the situation where winning bidders form an affiliation *after* the end of the auction but *before* any spectrum licences are issued. If an affiliation is formed in these circumstances, this Part sets out how spectrum licences will be issued to ensure that compliance with the spectrum licence limits directions is maintained.

Section 2.1 Meaning of *allocation limits*

This section defines the limits on the aggregate of the parts of the spectrum that, as a result of the allocation of spectrum licences under this Determination, may be used by any one person or specified groups of persons.

Specifically, this section sets out the allocation limits that apply to each applicant or bidder and their associates (and affiliates) under this Determination, which include:

- > 25 MHz of spectrum in the area specified in subsection 4(2) of the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2012* in the frequency band 703 MHz to 748 MHz; and
- > 25 MHz of spectrum in the area specified in subsection 4(2) of the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2012* in the frequency band 758 MHz to 803 MHz; and
- > 40 MHz of spectrum in any of the areas specified in subsection 4(2) of the *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2012* in the frequency band 2500 MHz to 2570 MHz; and
- > 40 MHz of spectrum in any of the areas specified in subsection 4(2) of the *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2012* in the frequency band 2620 MHz to 2690 MHz.

The ACMA is, in accordance with the 2.5 GHz Marketing Plan, dividing the 2.5 GHz band into regional lots. This means that bidders will be able to acquire up to 2 x 40 MHz of spectrum in *each* geographic region. For more information, see the 2.5 GHz Marketing Plan, and associated explanatory statement.

Section 2.2 Meaning of *associate*

The Minister has directed the ACMA to apply allocation limits on the amount of spectrum that can be used by a person or specified group of persons as a result of the allocation of spectrum licences under this Determination. Section 1.4 of the Determination defines 'specified group of persons' as the applicant or bidder and the applicant's or bidder's 'associates'. This section defines the term *associate* for the purposes of determining who is within a specified group of persons, for the purpose of complying with the allocation limits. *Associate* is defined as any persons that have a specified

relationship with an applicant or bidder. This includes any persons that are party to a 'relevant agreement' with the applicant or bidder as defined under subsection 2.2(2).

According to the explanatory statements for the spectrum licence limits directions, the inclusion of a 'relevant agreement' is designed to cover situations where there may otherwise be no formal associate relationship existing between two persons, but one person (the first person) has agreed that another would acquire spectrum ostensibly in their own right, but in actuality would be for the benefit of the first person. Roaming services agreements between mobile telecommunications carriers, and agreements between carriers provided for under the *Telecommunications Act 1997* or Part XIC of the *Competition and Consumer Act*, are not included in the meaning of 'relevant agreement' for the purposes of defining an 'associate'. This definition of the term *associate* in the Determination is consistent with the definition employed in the spectrum licence limits directions. More information on the definition can be found in the explanatory statements for the spectrum licence limits directions.

Section 2.3 Affiliation between applicants or bidders

Under Part 4 of this Determination, the ACMA has determined auction procedures that ensure affiliated applicants or bidders do not participate in the auction as separate bidding entities. These procedures have the effect of helping to ensure that the allocation limits set out in this Determination are not exceeded.

This section explains when two applicants or bidders will be taken to be affiliated, and explains that affiliated applicants or bidders will be taken to be a single specified group of persons for the purpose of applying the allocation limits. Two applicants or bidders are affiliated if they are associates of each other or they have an associate in common. An example would be where two applicants or bidders have a director in common, even if the two companies are not related in any other way. This is included in order to comply with subsection 3(3) of each of the spectrum licence limits directions.

Section 2.4 Information relevant to considering whether applicants or bidders are affiliated

This section sets out what matters that the ACMA will take into account in considering whether an affiliation exists between two or more applicants or bidders. This section does not limit the matters that the ACMA may take into account in determining whether two or more applicants are affiliated.

Part 3 Confidentiality

To maintain the integrity of the auction process it is vital that the Determination contains appropriate provisions preventing collusive behaviour between applicants and bidders. Collusion in the context of the auction could occur through the communication of information that may have the capacity to affect the outcome of the auction. Accordingly, rules have been set which are aimed at preventing the communication of such information by applicants and bidders. Central to this Part are the concepts of 'confidential information' and 'related person'. Confidential information is information relating to the auction and, for an applicant or bidder, includes information about the applicant's bids or bidding strategies. It also includes the applicant's application documents. A 'related person', in relation to an applicant or bidder, means a director or company secretary, an employee, or an employee of a related body corporate that provides services to the applicant or bidder.

This Part sets out rules prohibiting the disclosure of confidential information by applicants and related persons both before and during the auction process. It details what information should not be communicated and sets out the duration of the confidentiality obligation upon each applicant or related person. In addition this Part requires each related person of an applicant, other than a director or company secretary of the applicant, to provide a deed of confidentiality to the ACMA.

These rules are intended to complement the rules around cartel conduct contained within the *Competition and Consumer Act 2010* (the **CC Act**). Part IV Division 1 of the CC Act deals with 'Cartel

Conduct'. The simplified outline of the Part, in section 44ZZRA of the CC Act, states that 'a corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision. A cartel provision is a provision relating to... (d) bid rigging; by parties that are or would otherwise be, in competition with each other'.

The ACMA has established separate confidentiality rules in this Determination for several reasons including the following:

- The cartel provisions of the CC Act (incorporating both criminal and civil provisions) set a high evidentiary burden, and sole reliance on the CC Act would not provide the ACMA with any means to address collusive behaviour administratively during the auction process. This could in turn have flow on effects for the auction process itself. Without the power to exclude bidders for collusive behaviour, the ACMA would rely solely on referring the matter to the Australian Competition and Consumer Commission (the **ACCC**) for investigation. This could place an auction outcome in question for some time, pending the outcome of any ACCC investigation.
- The CC Act provides that two parties need to 'make' or 'give effect' to a cartel provision. The provisions do not cover 'one way' communication, where a would-be colluder contacts another applicant regarding bidding strategies or provides unsolicited information about bidding strategies to someone else. The CC Act also has limited application with regard to price signalling, although this has been recently strengthened by the *Competition and Consumer Amendment Act (No. 1) 2011*.³

It is intended that the rules set out in this Division would complement the powers of the ACCC. If a potential contravention of the confidentiality rules were identified, it would be handled by the ACMA in accordance with Part 6 of the Determination.

Section 3.1 Meaning of *confidential information*

The definition of the term *confidential information* forms the basis of the confidentiality rules under this Part. The section sets out what information is classified as *confidential information* under this Determination. The definition includes information that could give rise to collusion if disclosed, such as information about a bid, or about bids that an applicant or bidder proposes to make, their bidding strategy, or the amount they are willing to pay for a lot or group of lots. It also includes documents an applicant or bidder has given to the ACMA for the purpose of the auction (e.g., their eligibility nomination form) and information provided to a bidder for the purposes of participating in the auction. More generally, the definition also covers any information that, if disclosed, could be expected to affect or is capable of affecting another applicant or bidder's bids or bidding strategy or the outcome of the auction.

Section 3.2 Obligation to not disclose confidential information

This section states that an applicant or bidder who has knowledge of the applicant or bidder's confidential information as defined in this Determination must not disclose this information to any person, barring specific exceptions listed in this section. The same non-disclosure obligation also applies to a related person of an applicant or bidder who has knowledge of an applicant or bidder's confidential information.

Although the disclosure of confidential information is prohibited by this section, the ACMA acknowledges that in order for an applicant to effectively participate in the auction process (and comply with other requirements not related to the auction process) there are certain limited circumstances in which confidential information may need to be communicated to another person. Subsection 3.2(2) details the exceptions to the prohibition on the disclosure of confidential information. These include where an applicant or bidder discloses confidential information to another related

³ The *Competition and Consumer Amendment Act (No. 1) 2011* became operative on 6 June 2012.

person of the same applicant or bidder, or to an advisor or consultant for the purpose of obtaining advice relating to the auction or obtaining finance to purchase spectrum licences in the auction. It also includes where an applicant or bidder discloses confidential information to the ACMA, as authorised by this Determination, or as required by law.

Information that would otherwise fall within the definition of confidential information but is already publicly available (and was not made available because of a breach of this section) will also be exempt from the obligation set out in this section.

Section 3.3 Duration of confidentiality obligation

In order to protect against collusion at all stages of the auction process, the rules on confidential information apply to each applicant, bidder and related person with knowledge of the applicant or bidder's confidential information from the date of application until after the auction has ended. This section sets out the circumstances that will take place after the auction that will end the confidentiality obligation for an applicant or bidder, and a related person. An applicant or bidder and their related persons will not be released from the obligation not to disclose confidential information until one of the circumstances set out in this section takes place (i.e., a bidder is asked to make a statement as a winning bidder, notified that they are not a winning bidder, or an applicant or bidder is notified that their confidentiality obligation is at an end).

Section 3.4 Reporting breach of confidentiality

Given its potential impact on the outcome of the auction process, and to ensure a fair and robust auction, it is important that the ACMA is made aware of any breach of the rules on confidentiality as soon as possible. This section requires applicants and bidders, and their related persons, to notify the ACMA in writing as soon as possible after becoming aware of a breach of the confidentiality rules, and no later than two working days after becoming aware of the breach.

Section 3.5 Notice of breach of confidentiality

This section states that where the ACMA has reason to believe there has been a breach of the rules regarding the disclosure or receipt of confidential information by an applicant or bidder (or a related person of an applicant or bidder) the ACMA must advise the applicant or bidder of that fact and ask it to make submissions to the ACMA on this matter. The ACMA must also set a deadline for the provision of any submissions of no more than five working days after the date of the request.

The ACMA is not obliged to tell the applicant or bidder of its belief until as soon as practicable after the auction period ends.

This section is intended to ensure that applicants and bidders are informed about circumstances in which the ACMA believes they may have breached the confidentiality rules, and have an opportunity to make submissions about the matter.

Section 3.6 Deed of confidentiality required from related persons

A deed of confidentiality represents a conscious commitment on the part of each related person of an applicant or bidder that they will comply with these important rules regarding the disclosure of confidential information throughout the auction process. The ACMA believes it is very important that individual employees of an applicant or bidder (or of a related body corporate that provides services to the applicant or bidder) who have knowledge of their employer's confidential information (as defined in section 3.1 of the Determination) understand the importance of confidentiality in this process and acknowledge this through signing a confidentiality deed. The section states that a deed of confidentiality will only be required from related persons who are also employees of the applicant or bidder, or employees of a related body corporate of the applicant or bidder that provides services to the applicant or bidder. The obligation to complete a deed of confidentiality under this section will not extend to a director or company secretary of an applicant or bidder. Where a related person of an

applicant gains knowledge of the applicant's confidential information prior to the application deadline, a deed of confidentiality from the related person must be submitted to the ACMA by the application deadline.

PART 4 PROCEDURES BEFORE AUCTION

This Part sets out how interested parties can apply to take part in the auction. It describes the application and registration processes, including the ACMA's obligations to make information about the allocation process publicly available. It also sets out the fees and payments required to participate in the auction, the basis upon which these are calculated and how the ACMA must set lot ratings and starting clock round prices.

Division 1 Preliminary

Section 4.1 Auction manager

This section states that the ACMA must appoint a person to manage the auction (the **auction manager**). This appointment will be made in writing. The auction manager will facilitate and manage the auction conducted under this Determination.

The auction manager will have a number of specific responsibilities to manage and facilitate the auction. These responsibilities include decisions about setting and changing the length of rounds, duration of recess periods between rounds, increment price rises on lots between clock rounds, and other auction variables. In some circumstances, the auction manager will exercise their responsibilities through the auction system. The auction manager will also act as the central point of contact for internal and external auction-related enquiries.

The responsibilities and powers of the auction manager are specified throughout the Determination where applicable.

The ACMA will publicise the appointment of the auction manager, including the name of the person, on the ACMA's website and in the ACMA's Spectrum Auction e-Bulletin (a free subscription is available from www.acma.gov.au). Information about the auction manager will also be provided in the Applicant Information Package (the **AIP**) (see section 4.5 below) and in material sent out to registered bidders under section 4.19.

Section 4.2 Setting application fee

This section states that the ACMA must set an application fee amount prior to inviting applications for the auction. This amount set will be included in a notice to advertise the auction and must be paid as part of a valid application.

Section 4.3 Application fee not refundable

This section states that the application fee to be paid under this Determination as part of the application requirements will not be refunded to an applicant or bidder under any circumstances. The non-refundable nature of this payment is intended to help deter applicants who do not genuinely wish to bid in the auction.

Division 2 Advertising auction

This division explains the obligations of the ACMA to advertise the auction and make information about the auction available to the public.

Section 4.4 Advertising of auction by ACMA

This section states that the ACMA must publish a notice on its website (www.acma.gov.au) inviting interested persons to apply to the ACMA to participate in the auction. The notice will specify the

spectrum to be allocated and will describe in general terms how the allocation will proceed. It will also inform prospective applicants how they may obtain an information package that will explain the auction in greater detail.

The deadlines for lodging the documentation and payments required for the application and eligibility nomination stages of registration to participate in the auction will also be included in the notice.

This section also notes that if there are any changes to information in the notice, the ACMA must publish another notice on its website with details of the change. Subsection (3) clarifies that the ACMA may also publish the information provided in the advertisement, and other information about the auction, by other means.

Section 4.5 Applicant Information Package

The AIP is intended to give prospective auction participants the key information they need to decide whether to participate in the auction. This section specifies the information that the AIP will contain. The AIP will include the legislative instruments and Ministerial declarations and directions that provide the legal basis for the 700 MHz and 2.5 GHz band allocations.

The AIP will provide information needed for a person to apply, be registered, participate in the auction and obtain spectrum licences. All forms and documentation required for an applicant to apply and be registered to participate in the auction will be provided, except for the eligibility nomination form. This form will be made available no later than 70 days after the notice is published, in accordance with section 4.6 of this Determination.

To assist interested parties to better understand the contents of the AIP, this package will include a covering paper which will set out a concise summary of how the allocation will take place as well as any other relevant information. This document is referred to in the Determination as the 'guide to the auction' (section 4.5(1)(e)).

This provision states that the ACMA must publish on its website a notice giving detail of any changes made to the AIP.

Section 4.6 Lot ratings and initial prices

This section provides that the ACMA must set:

- > the lot rating for lots in each product
- > the dollar value of each initial eligibility point for the auction
- > the starting round price for lots in each product for the first clock round.

After setting the lot ratings and initial prices, the ACMA must approve an eligibility nomination form to be completed by applicants as part of the registration process. The ACMA must publish each amount set under section 4.6, and the approved eligibility nomination form, on its website no later than 70 days after the ACMA publishes a notice of the auction under subsection 4.4(1).

The effect of the *Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No. 1 of 2012* was that the Minister had up to 60 days after the ACMA advertises the auction under subsection 4.4(1) of the Determination to give the ACMA a further direction on setting reserve prices. On 14 December 2012, the Minister gave the ACMA such a direction, the *Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No. 2 of 2012*, directing the ACMA to set the reserve price for lots in the 700 MHz band at AUD 1.36/MHz/Pop and also directed the ACMA to set the reserve price for lots in the 2.5 GHz band.

The eligibility nomination form must be used by applicants to nominate the number of initial eligibility points they wish to hold from the first round of the auction. It will be necessary for applicants to know the value of lot ratings and initial prices set in section 4.6 in order to calculate the number of initial

eligibility points they need to bid on spectrum they wish to acquire. The ACMA must ensure that the approved form includes a guide to calculating the number of initial eligibility points to be nominated by an applicant.

It will also be necessary for applicants to know the value of these amounts before they determine their initial eligibility under section 4.13. Applicants should be aware that the value of each initial eligibility point will not necessarily be equal to the reserve price of a lot divided by the lot rating for the same lot. This is because the ACMA has discretion to set a discounted value for initial eligibility points. The effect of this would be to make the eligibility payment required from applicants under section 4.14 less than the combined reserve price for all lots that they wish to be able to bid on from the first clock round.

The starting round price is equivalent to the reserve price for each lot. It will not be possible within the auction system for an applicant to place a bid for an amount below the starting round price.

As well as providing the basis for applicants to nominate their initial eligibility, lot ratings will also be used to apply the auction activity rules that will enable each bidder to bid flexibly on its most profitable package in each auction round. Each registered applicant will be able to bid on any package of lots, where the total lot rating amount for the package is the same as, or smaller than, their initial eligibility. However, if an applicant chooses to bid on a smaller package, the total number of eligibility points of that package (also equal to the total lot ratings for lots comprising that package) will become their new eligibility for the next round. When a bidder reduces their eligibility, this will constrain the size of future packages that can be bid on. Further information about bidding constraints is discussed in Schedule 1 below.

Lot ratings will also affect the extent to which bidders can switch bids between the two bands being auctioned (700 MHz and 2.5 GHz) and across regional lots in the 2.5 GHz band. In addition, setting appropriate lot ratings is important to reduce the scope for strategic 'gaming' behaviour by bidders. Lot ratings, and their relationship to an applicant's eligibility, will be used to require applicants to maintain a level of bidding activity throughout the auction if they wish to retain maximum flexibility to bid on desired packages of lots. This activity requirement is designed to promote truthful bidding and price discovery during the auction. It will also prevent applicants from waiting until the end of the auction before revealing their true bidding preferences in an attempt to keep prices low (bid sniping).

Division 3 Application to participate in auction

This division sets out how a person can apply to participate in the auction. It also explains the process for resolving affiliations identified between applicants before applicants are registered.

Section 4.7 Lodging application

To take part in the auction, interested persons must first apply to the ACMA to be registered as a bidder to participate. This section sets out the required documents and forms that a prospective applicant must submit, and the application fee that the prospective applicant must pay, to the ACMA. For an application to be considered valid, applicants must do the following before the application deadline:

- > lodge a completed application form.
- > lodge a signed Deed of Confidentiality completed by the applicant.
- > lodge a signed Deed of Acknowledgement completed by the applicant, which specifies that the applicant agrees to be bound by the terms of the Determination.
- > pay the application fee set by the ACMA under section 4.2, in the manner specified in section 1.7.

Blank copies of the application form and the two deeds will be provided in the AIP.

For any documents lodged by email or fax, original documents must be received by the ACMA within three working days of the application deadline. That is, the original of such documents must be physically delivered to the ACMA. At its discretion, the ACMA can grant an extension to the date by which an applicant must deliver original documents.

The confidentiality provisions in section 3.6 also require each applicant to provide a signed deed of confidentiality from each related person who fits the definition in section 3.6.

Instructions on how to lodge documents are explained in section 1.6. An applicant may also lodge an updated document at any time prior to the application deadline, but not afterwards.

Section 4.8 Applicants to notify ACMA if application information incorrect

This section requires an applicant to provide the ACMA with correct information, if it becomes aware that information in its application has changed or is incorrect.

Section 4.9 Applicant to provide statutory declaration

To ensure that affiliated applicants do not participate in the auction as separate bidders, the ACMA has included procedures to identify affiliated applicants before the commencement of the auction. This provision sets out the requirements that will assist the ACMA to identify whether any two or more applicants are affiliated.

After the application deadline, the ACMA will provide each applicant with a list of all other applicants, and the persons those applicants have identified as their associates. The information distributed will be based on details provided as part of each person's application. The application form includes a requirement for applicants to provide information about themselves as well as their associates.

The ACMA will ask each applicant to identify from the list provided by the ACMA whether they are affiliated with any other applicant. Under this section, applicants must then make a statutory declaration to the ACMA stating whether they are affiliated with another applicant, and if so, giving details of that affiliation. Applicants will have at least five working days after the date of the ACMA's request under this section to provide a statutory declaration. This timeframe is intended to give applicants sufficient time to provide accurate information in the statutory declaration, without unduly delaying the auction.

Where the ACMA is satisfied that an affiliation exists between two or more applicants, the applicants will be required to choose one of the options available under section 4.11 before their application(s) will be considered further.

Section 4.10 Failure to provide statutory declaration

This section sets out the consequences of failing to provide a statutory declaration in accordance with section 4.9. Applicants who do not provide the statutory declaration in the manner set out in section 4.9 will be considered to have withdrawn from the auction. They will not be entitled to re-apply or take part in the auction, and will not be allocated spectrum under this Determination (see explanation of subsection 4.15(4) of the Determination below).

Section 4.11 Procedure if ACMA satisfied applicants affiliated

This section sets out the options available to a group of two or more applicants where the ACMA is satisfied that they are affiliated. The aim of this section is to assist applicants that are affiliated by providing them with a range of options that they may use to resolve any affiliation so as to enable their participation in the auction.

Under this section, the ACMA must write to each affiliated applicant and explain the reasons why it considers them to be affiliated. The ACMA must also tell all affiliated applicants the options available to them under this section. Affiliated applicants are required to notify the ACMA in writing within ten

working days of receiving notification from the ACMA of which option they propose to take. The options available to affiliated applicants under this section are:

- (a) to withdraw the applications of all the affiliated applicants and submit a new application, as a single new applicant, under section 4.12
- (b) to withdraw the applications of all but one of the affiliated applicants.

Under this section, the ACMA will consider **all** of the affiliated applicants to have withdrawn their applications if the applicants do not respond to the ACMA within ten working days of the notification. An affiliated applicant is also taken to have withdrawn if it is one of a remaining group of two or more affiliated applicants who have not informed the ACMA of their intention to withdraw.

Where applicants are taken to have to withdrawn under this section, the ACMA must notify those applicants and they will not be able to reapply (see subsection 4.15(4) of the Determination).

Section 4.12 Requirements for new application

This section allows one or all of a group of affiliated applicants who have withdrawn their applications under subsection 4.11(1) to make a new application as a single applicant. It sets out the process and timeframe for lodging a new application. A new application made under this section must be accompanied by an additional payment of the application fee.

New applicants will have:

- > 10 working days from the time that they are notified of being an affiliated applicant to submit a completed application form and pay the application fee to the ACMA (after receiving the application form and fee, the ACMA will give each applicant, including the new applicant, updated details of all other applicants who have not withdrawn, and their identified associates)
- > 3 working days from the time they are given updated details of all applicants and their associates (unless the ACMA states a longer duration) to submit: a completed deed of acknowledgement form; a completed deed of confidentiality form; and a statutory declaration that they are not affiliated with any other applicant that has not withdrawn. If these documents are given to the ACMA by email or fax, then the original document(s) must also be received by the ACMA within 3 working days from the time they are given updated details of all applicants and their associates (unless the ACMA states a longer duration).

This timing is intended to give affiliated applicants sufficient time to prepare a new application in accordance with this section.

This section is also intended to provide an opportunity for affiliated applicants to participate in the auction as a single bidding entity in a manner that will ensure that the allocation limits expressed in section 2.1 are not exceeded.

Division 4 Eligibility nomination and financial security

This division makes provision for the ACMA to approve an eligibility nomination form and provide it to applicants. It describes the procedure for an applicant to fulfil the documentation and payment requirements by the eligibility deadline.

Section 4.13 Lodging eligibility nomination form

This section explains the requirement for an applicant to nominate its initial eligibility points for the auction by lodging an eligibility nomination form with the ACMA. A bidder's use of eligibility points is subject to the allocation limits set out in section 2.1 of the Determination.

Before the auction, the ACMA will specify the lot ratings for each spectrum lot on offer under this Determination. The lot rating for each lot will be made up of a number of eligibility points. The number

of eligibility points given to a lot will reflect the relative value of that lot compared to other lots on offer in the auction.

Each applicant will be required to set their initial eligibility before the auction starts. Initial eligibility will be determined by an applicant choosing a number of eligibility points. Applicants can select any number of eligibility points up to the aggregate number of eligibility points for all lots on offer.

The initial eligibility nominated by applicants will constrain the total combination of lots that they will be able to bid for and acquire from the first round of the auction.

Applicants will select their initial eligibility points by completing an eligibility nomination form. The form will include a guide to calculating initial eligibility points. It will also include details of the number of eligibility points assigned to lots in each product, the dollar value of each eligibility point, and the price of lots in each product in the first clock round.

Instructions on how to lodge documents are given in section 1.6. If an applicant lodges their eligibility nomination form to the ACMA by email or fax before the eligibility deadline, the original form must be received by the ACMA no later than three working days after the eligibility deadline for the nomination to be valid, or by a later date if approved by the ACMA.

Applicants may vary their initial eligibility by submitting a new eligibility nomination form; however, this must be lodged before the eligibility deadline. If an applicant changes its initial eligibility, consequential changes to the eligibility payment or the financial security deed the applicant has provided under section 4.14 must be made to match the new eligibility payment amount.

Section 4.14 Eligibility payment or deed of financial security required for initial eligibility points

An applicant wishing to be registered to participate in the auction must secure initial eligibility points. An applicant can secure initial eligibility points by making an eligibility payment or providing a deed of financial security to the ACMA by the eligibility deadline.

Under this section, the amount required to secure the desired number of initial eligibility points is determined by multiplying the applicant's initial eligibility points (nominated in its eligibility nomination form) by the amount in Australian dollars that each point is worth, as set by the ACMA under section 4.6. Applicants have the choice of paying this amount upfront in full, paying a portion of the amount upfront and giving the ACMA a deed of financial security for the remaining amount, or by giving the ACMA a deed of financial security for the full amount. Details of the requirements that apply to deeds of financial security offered under this section are set out in subsections (4), (5) and (6) of this section.

A situation may arise where the combined amount provided to the ACMA by an applicant as security is less than the amount that is due based on the number of eligibility points that an applicant has selected in their eligibility nomination form. Applicants can provide the ACMA with additional security to make up the balance prior to the eligibility deadline to secure the number initial eligibility points they have nominated. However, if such an underpayment exists after the eligibility deadline, then the number of initial eligibility points that will be secured by the applicant will be equal to the total amount paid or secured by deed by the dollar value of initial eligibility points, rounded down to the nearest whole point.

If a deed of financial security is given to the ACMA by email or fax, the original document must also be received by the ACMA within three working days of the eligibility deadline for the deed to be considered to have been given to the ACMA. At its discretion, the ACMA can grant an extension to the date by which an applicant must deliver original documents.

Under subsection 4.14(7) of the Determination, an applicant is considered to have withdrawn if it fails to provide payment under this section, or fails to provide a properly executed deed of financial security

in accordance with the requirements of this section, or the ACMA is not satisfied that the person executing a deed of financial security is a person mentioned in subsection 4.14(4).

Division 5 Withdrawal

This division sets out the rules by which an applicant can withdraw and the consequences of withdrawal.

Section 4.15 Withdrawal of applicant

This section describes how and when an applicant may withdraw from the auction. It also describes the consequences of withdrawing an application.

An applicant can withdraw from the auction any time before the eligibility deadline; however, it must inform the ACMA of this in writing. An applicant who has withdrawn will not be re-admitted to the auction and cannot be allocated spectrum under this Determination.

Any eligibility payment amount paid by an applicant who withdraws before the eligibility deadline, or that is taken to have withdrawn under other sections of the Determination, will be refunded. Under section 4.3 of the Determination, any application fee paid by an applicant who withdraws before the auction will *not* be refunded.

Division 6 Setting elements of auction

Section 4.16 Supplementary bid limit

This section states that the ACMA must set the supplementary bid limit. The supplementary bid limit is the maximum number of bids that each bidder can place in the supplementary round.

The ACMA must set the supplementary bid limit after the application deadline and must inform each applicant who has not withdrawn of this limit at least five working days prior to the eligibility deadline.

Section 4.17 First clock round

This section specifies that the auction manager must set the start date and time of the first clock round of the auction following the eligibility deadline. This date must be at least 15 working days after the eligibility deadline and the auction manager must notify bidders of the date and time at least 10 working days before the clock round starts.

Division 7 Registration of bidders

This division sets out the obligations on the ACMA for maintaining a register of bidders and explains the procedure for bidders to be registered. It also describes the information that bidders will be provided with about the auction system once they are registered and explains that the ACMA will give registered bidders an opportunity to familiarise themselves with using the auction system as a bidder prior to the auction.

Section 4.18 Register of bidders

This section specifies that the ACMA must maintain an electronic register of bidders and sets out the obligations on bidders and the ACMA to keep details on the register up-to-date. It also provides a list of details that the register must contain.

Bidders will be notified of the information relating to their application that will be included in the register and must, under this provision, inform the ACMA if they become aware of any change to these details and provide updated information. The ACMA must update the register accordingly.

Section 4.19 Registration process

This section sets out the requirements that must be satisfied in order for a person to be registered as a bidder. In order for an applicant to be registered as a bidder it must have:

- > submitted a valid application
- > lodged a completed eligibility nomination form
- > paid the applicable eligibility payment, provided a deed of financial security or a combination of the two, in accordance with the requirement in section 4.14.

Applicants will only become a 'bidder' when their details are entered into the register. This provision states that the ACMA must not register a bidder until after the eligibility deadline has passed.

This section also explains that the ACMA must notify an applicant that it is registered as a bidder after the eligibility deadline. At that time, the ACMA will provide bidders with the contact details for the ACMA, and a copy of their information recorded in the register for the bidders. Bidders will also receive information and tools to access and use the auction system, as well as information explaining how to submit an offline bid if they are unable to use the auction system during the auction.

The information provided to a bidder under this section for the purpose of participating in the auction is classed as *confidential information* under section 3.1.

Section 4.20 Bidders to notify ACMA if register incorrect

The section explains that a bidder has an ongoing responsibility to tell the ACMA if any of the information about the bidder or its associates on the register of bidders is incorrect. If information is incorrect, the bidder must immediately give the ACMA the correct information.

Section 4.21 Preparation for bidding

This section provides that the ACMA will give each applicant an opportunity to participate as bidders in trial auctions using the auction system prior to the start of the auction. Prior to taking part in trial auctions, bidders will have the opportunity to view a presentation that will familiarise them with the online interface of the auction system. Bidders will also receive a user guide to accessing and using the auction system.

Section 4.22 Security of auction

This section sets out the obligations in the Determination that a bidder has to ensure the security of the auction system. These are in addition to provisions in the *Criminal Code* dealing with computer offences that bidders must abide by.

The section explains that during the auction period a bidder must keep secure any items provided by the ACMA to access the auction system. Such items may include hardware tokens issued to bidders for the purpose of bidder authentication when accessing the auction system. If any such items are lost or stolen during the auction period, the bidder must notify the ACMA immediately.

PART 5 AUCTION PROCEDURES

This Part describes the structure, process and rules of the Combinatorial Clock auction to be held under this Determination.

The ACMA has chosen the CCA as the auction methodology that is most likely to deliver an efficient outcome and enable spectrum to be allocated to persons who value it the highest. This decision took into account the fact that 700 MHz band spectrum will be allocated in the same auction process as the 2.5 GHz band spectrum and the CCA is ideally suited to package bidding. The two bands that will be offered at auction can offer complementary signal propagation characteristics when used to deliver mobile communications service over a wide-scale network.

The major attributes that make the CCA methodology suited to maximising the efficient allocation of 2.5 GHz and 700 MHz band spectrum in the combined band auction are as follows:

- > It allows package bidding – this will give bidders a high level of flexibility to bid on packages of lots within a single band or across bands. Bidders have certainty that if they win lots, they will win all lots in a package, rather than risk exposing themselves to winning only part of a package that may be insufficient for their business needs.
- > The CCA enables bidders to easily change their bidding strategy to switch to different packages that may become more profitable to them as the auction progresses. That is, bidders may wish to bid on an alternative package when the difference between the bidder's value of the package currently being bid on and the current auction price becomes less than the equivalent difference for an alternative package. This situation may occur as the price rises higher than anticipated for a particular product or when the ratio of prices between different products changes significantly over the course of the auction.
- > The package bidding nature of the CCA methodology also makes it well adapted to auctions where complementary products are on offer. Complementarity exists where the bidders place a higher value on acquiring a set of items than the sum of the individual value of each item in the set. With bidders having certainty that they can only win whole packages of lots, they are able to express their true value for complementary products in the auction.

Division 1 Procedures to be applied

This division provides detail on the procedures to be applied depending on whether there is a single bidder or multiple bidders participating in the auction.

Section 5.1 Auction stages

This section sets out that the auction will consist of two stages: the allocation stage and the assignment stage.

The allocation stage consists of one or more clock rounds followed by a single supplementary round. This stage will determine the quantum of lots in each product that each bidder has won.

The assignment stage will be used to determine what frequency ranges are assigned to spectrum won by bidders in the allocation stage.

Further information about the function and operation of each auction stage is provided in the notes to Schedule 1 of the Determination, below.

Section 5.2 Procedures if only one bidder

There are several circumstances which could lead to a situation where there is only one bidder registered to participate in the auction. The ACMA may only receive one application to take part in the auction. Alternatively, a group of affiliated applicants may fail to resolve their affiliation as set out in section 4.11 and be taken to have withdrawn from the auction, leaving only an unaffiliated applicant.

Certain auction processes have been designed around the presence of multiple bidders. If only one applicant is registered to participate in the auction, the imposition of some of these processes would lead to unnecessary delay. For that reason, the ACMA has set out a shortened auction process which will apply where there is only a single registered bidder. Where there is only one bidder, the ACMA will notify them of this fact as soon as practicable after the eligibility deadline.

In the absence of competition, a bidder is able to select the package of spectrum they value the most in the first clock round at the dollar amounts set for each lot by the ACMA under section 4.6. This effectively makes the supplementary round, where bidders can bid on other packages they value or

increase the amount that they have already bid on an existing package, redundant. As such, the supplementary round will not apply where there is only one bidder.

This section explains how the shortened auction process will operate, including the removal of the supplementary bidding stage, as well as removing time delays between auction stages (which would normally apply where there are two or more registered bidders).

Section 5.3 Clock rounds

This section explains the auction procedures that will apply during the clock round component of the allocation stage. This is done by reference to Part 1 of Schedule 1 to the Determination which sets out in detail the auction rules that will apply to the process.

Section 5.4 Supplementary round

This section explains the auction procedures that will apply during the supplementary round component of the allocation stage where there are two or more bidders. This is done by reference to Part 2 of Schedule 1 to the Determination, which sets out in detail the auction rules that will apply to the process.

Section 5.5 Determination of results of allocation stage

This section explains how winning bids are determined at the end of the allocation stage. This is done by reference to Part 3 of Schedule 1 to the Determination, which defines the auction rules that the auction manager will use to identify winning bids. This section also states what information the auction manager must release to bidders after the results are known.

Determination of the winning bids at the end of the allocation stage will decide the lots of each product that each successful bidder has won in this stage. It will also determine the allocation price for the spectrum won that a bidder must pay in order to be issued a spectrum licence.

At the end of the allocation stage, the auction manager must provide each winning bidder with details of the spectrum that they have won and the allocation price for their winning bid. All bidders will also be told how many bidders were successful and how many lots in each product have been allocated to winning bidders.

Section 5.6 Assignment stage

This section states how the assignment stage of the auction will be conducted. It does this by reference to Part 4 of Schedule 1 to the Determination. This section also describes what information the auction manager must release to winning bidders after the results of the assignment stage are known.

The assignment stage will determine what assignment prices are required to be paid by winning bidders before they can be issued spectrum licences allocated in this auction. The assignment price to be paid by a winning bidder is in addition to the allocation price for spectrum determined at the end of the allocation stage.

Section 5.7 Auction manager's discretion to accept bids

During the auction, unanticipated circumstances may arise that prevent a bidder from being able to use the auction system to submit a bid *during a round*. For example, a sudden power blackout may cut a bidder's computer access to the auction system. This section gives the auction manager the discretion to permit a bid to be submitted by an alternative method. Bidders will receive information about how they can submit a bid if they are unable to use the auction system once they are registered under section 4.19.

Under this section, the auction manager also has discretion to permit a bidder to submit a bid *after a round has ended*, but only if they are satisfied that technical or communication problems have prevented the bidder from submitting a bid during the round. Bids that have been submitted in this way will be regarded as having been made during the round for the purposes of calculating the results of a round just ended. A bid cannot be submitted after information about the outcome of a round has been given to bidders.

Section 5.8 Action that auction manager may take in exceptional circumstances

Exceptional circumstances may arise that affect the auction. If the auction manager is satisfied that this has occurred, this section gives the auction manager permission to take a range of actions to overcome these circumstances. These actions can include restarting a round, cancelling the results of one or more rounds and restarting the auction from the point before those rounds, restarting the auction from the first clock round, or stopping the auction.

This section also sets out examples of exceptional circumstances that could permit the auction manager to take discretionary action under this provision. However, the examples given are not exhaustive and do not preclude other circumstances from being regarded as exceptional.

Division 2 Affiliations during auction

This division defines the obligation on a bidder not to be affiliated with another bidder during the auction period, and describes the responsibilities of bidders to inform the ACMA of any affiliations with any other bidder. It also explains the consequences for bidders who are affiliated during the auction period.

Section 5.9 Affiliation during auction period not permitted

This section provides that a bidder must not be affiliated with another bidder during the auction period (defined in section 1.4). If the ACMA is satisfied that a breach of this provision has occurred, the ACMA may take action under the enforcement provisions in section 7.6.

Section 5.10 Requirement to report affiliation

Under this provision, a bidder is obliged to immediately tell the ACMA in writing if it (the bidder) believes that it may be affiliated with another bidder during the auction period, noting the identity of the other bidder and the nature of the affiliation.

Section 5.11 Auction continues despite possible affiliation

This section states the immediate consequences if the ACMA becomes aware during the auction period that two or more bidders may be affiliated. The auction will proceed normally and any bidders who may be affiliated are permitted to continue to participate.

However, the ACMA will consider any potential affiliations between bidders occurring during the auction period once the auction period has ended. This process is set out in section 5.12.

Section 5.12 ACMA consideration of affiliation

This section explains what steps the ACMA will take if it becomes aware that two or more bidders are affiliated during the auction period.

During or after the auction period, the ACMA will consider whether it has reason to believe that the bidders were actually affiliated *during* the auction period. If the ACMA forms the belief that an affiliation existed during the auction period, it must write to the affiliated bidders, notifying them of this fact and informing them of the basis on which it considers them to be affiliated. The ACMA may then proceed to make a decision under section 7.6 of the Determination.

If the ACMA does not consider that these bidders were affiliated during the auction, then the ACMA must also notify the bidders of that decision.

PART 6 PROCEDURES AFTER AUCTION

This Part describes the procedures and processes that will apply after the close of the auction. It includes details of how auction results will be confirmed, as well as outlining licence payment and procedures for issuing spectrum licences.

Division 1 Confirmation of auction results

This division outlines the procedures to be followed by the ACMA and bidders to enable the confirmation of auction results.

Section 6.1 Notice and refunds to unsuccessful bidders

This section sets out the procedure that the ACMA must follow for unsuccessful bidders who have not withdrawn or been excluded. Unsuccessful bidders will be notified as soon as practicable after the auction that they have not won any spectrum and that their confidentiality obligations under section 3.2 are lifted. The ACMA must refund any eligibility payment made by the unsuccessful bidder within a maximum period of 6 months of notifying the bidder that they are unsuccessful, except where the ACMA has decided to keep the eligibility payment under section 7.6 due to a breach of the auction rules.

Section 6.2 Notice to withdrawn applicants

This section states that the ACMA must advise withdrawn applicants that they are no longer bound by the confidentiality obligations under section 3.2 as soon as practicable after the end of the auction period. Whether notification occurs “as soon as practicable” after the auction may depend on any action the ACMA takes in relation to successful bidders. This section also notes that withdrawn applicants who have made eligibility payments will have these payments refunded.

Section 6.3 Winning bidder to make statement about affiliations

The ACMA is required to notify each winning bidder with the identification of all other winning bidders as soon as practicable after the end of the auction period. Each winning bidder is then required to provide the ACMA with a statement to say whether they are affiliated with any other winning bidder and if so, to provide details of that affiliation. The ACMA will not issue a spectrum licence to a winning bidder until this statement has been received. This section also sets out that the ACMA must state a deadline for the receipt of the statement that is no less than five working days after the date of request. The section also highlights the importance of winning bidders submitting a truthful statement. It notes that giving false or misleading information to the ACMA would constitute a serious offence under the *Criminal Code*.

The intention of this section is to enable the ACMA to obtain information to ensure that the licences issued under this Determination comply with the allocation limits set by the Minister (and defined in section 2.1).

Section 6.4 Notification that winning bidders are affiliated

This section states that the ACMA must notify winning bidders if it is satisfied that they became affiliated after (but not during) the auction period. This notification will provide details of the basis on which that decision has been made.

Section 6.5 Consequences of affiliation

Winning bidders who have been notified that the ACMA is satisfied that they formed an affiliation after the auction period remain subject to the allocation limits set out in section 2.1. This means that the ACMA may only issue licences to those affiliated winning bidders up to the allocation limits. For the

avoidance of doubt, this section applies only to two or more winning bidders whose affiliation first occurred after the end of the auction period. It does not apply to affiliations made during the auction period.

This section sets out that the ACMA will combine the total spectrum won by affiliated winning bidders. Where the issue of a spectrum licence for that combined spectrum would exceed the allocation limits, licences may only be issued up the specified limits.

In these circumstances, affiliated bidders may provide a direction to the ACMA specifying how the spectrum is to be allocated between them within the allocation limits. If no direction is provided within five working days, the ACMA may, for any part of the spectrum where the lots won by the bidders exceed the allocation limits, choose at its discretion how to allocate spectrum to each bidder up to the allocation limits. Any spectrum not allocated, because allocating it would be in excess of the allocation limits, will be treated as unallocated. The winning bidders must pay the balance of the winning price for all the lots 'won', even though it may not be allocated licences representing all of those lots. That is, the winning bidders must pay the full balance of the winning price for all lots 'won' despite receiving a smaller allocation as a result of this section.

Division 2 Payment and issue of licences

This division outlines procedures for determining final payment amounts, the conditions of payment, and the issue of refunds. The division also details the process for issuing of licences, when licences will commence, and the publication of auction results.

Section 6.6 Balance of winning price

This section describes how the balance of the winning price will be calculated for each winning bidder. After the auction, the ACMA will total the final winning prices payable by the winning bidder and deduct any eligibility payment the bidder has paid. The balance remaining after this deduction will be the balance of the winning price payable by the bidder.

Section 6.7 Sufficient eligibility payment—issue of licence without further payment

This section outlines refund and licence issue procedures where the final price to be paid by a winning bidder (allocation price and assignment price combined) is less than or equal to the sum of the eligibility payment.

If the eligibility payment paid by a winning bidder is greater than the total of the winning price, the ACMA will refund the difference, and the winning bidder will be entitled to be issued a spectrum licence without making any further payment to the ACMA.

If the allocation price and assignment prices exactly match the eligibility payment, resulting in the winning bidder's balance being zero, the bidder is entitled to be issued a licence for each part of the spectrum won at auction without further payment.

Section 6.8 Payment of balance of winning price

This section sets out the arrangements for notifying winning bidders of the balance of the winning price, where the amount is more than the bidder's eligibility payment. It also defines the timing by which this payment must be made.

If the balance of the winning price that has been calculated under section 6.6 is greater than zero, the ACMA must notify each winning bidder by registered mail of the balance owing. Any balance owing must be paid to the ACMA no later than 20 working days after the date of the notice.

Where the ACMA gives a revised notice to a winning bidder on or before the expiry of the 20 working days stated in the initial notice, the balance owing will be due no later than 10 working days after the expiry of the 20th day. If the revised notice is provided *after* the expiry of the 20 working days stated in

the initial notice, the due date for payment will be no later than 10 working days after the date of the revised notice.

Section 6.9 Issue of licence after payment of balance of winning price

This section provides that a winning bidder is entitled to be issued a licence for the spectrum allocated to it under the auction process by the ACMA only when the balance of the winning price has been paid by the winning bidder according to the procedure set out in section 6.8.

Section 6.10 Publication of auction results

The ACMA will release the auction results to the public. This section sets out what information the ACMA must announce or publish. The information released will include the names of the winning bidders, the spectrum awarded to each winning bidder, and the final winning prices paid or to be paid by each winning bidder.

PART 7 MISCELLANEOUS

This Part describes various miscellaneous matters that apply to the auction process, including the treatment of unallocated spectrum, enforcement procedures, and the liability of the ACMA under this instrument.

It also sets out information that the ACMA may obtain from applicants and bidders, as well as the treatment of information provided to the ACMA by applicants and bidders.

Section 7.1 Unallocated spectrum

There are several circumstances in which spectrum lots offered at auction are left unallocated. Some spectrum might not be allocated during the auction. In addition, the operation of this Determination might result in there being unallocated spectrum. For example, unallocated lots could arise where a winning bidder does not pay the balance of the winning price in accordance with section 6.8, or where the ACMA is satisfied that two or more winning bidders are affiliated and the spectrum won at auction by the affiliated winning bidders exceed the allocation limits.

This section provides that any parts of the spectrum that are offered at the auction but are not allocated may be allocated at a later date by the ACMA via procedures determined by the ACMA. The note to this section indicates that the ACMA is able to make determinations regarding allocation procedures under section 60 of the Act.

All parts of the spectrum that are offered at the auction but are not allocated may be allocated by a later process to be determined by the ACMA.

Section 7.2 Bidders must not misuse auction system

This section provides that a bidder must only access and use the auction system using the information provided by the ACMA under section 4.19, which requires the ACMA to give the bidder certain information once they are registered to participate in the auction. A bidder must not attempt to interfere with the auction system, or use it to breach a law of the Commonwealth.

Section 7.3 ACMA may obtain information from applicants and bidders

The ACMA may wish to obtain information or documents from an applicant for a number of reasons, including for the purposes of determining whether any contravention of the Determination has occurred.

This section sets out the circumstances in which the ACMA may require an applicant or a bidder to provide information or documents.

This section also makes provision for the ACMA to vary a notice previously provided to an applicant or bidder under this section, for example by widening the scope of the information sought, or changing the due date for providing the information.

The ACMA may require the information or documents requested of an applicant or bidder under this section to make decisions which could have a significant impact on their participation in the auction. This provision therefore notes that if a requirement in a notice given under section 7.3 is breached, including failure to provide available information or documentation when requested, the ACMA may take action under section 7.6 of the Determination. Section 7.6 permits the ACMA to retain an eligibility payment or enforce a deed of financial security.

Section 7.4 Use of information and documents by ACMA

Under this section, the ACMA may use any information or documents provided by an applicant or a bidder pursuant to the Determination, or learned by the ACMA in the exercise of its functions under the Determination, for the ACMA's purposes in exercising its function under the Determination. The ACMA's use of such information or documents extends to disclosure and/or publication of such information in the manner stated in the Determination. The ACMA may also use information to perform its powers or functions under the Determination in relation to a spectrum licence issued as a result of the auction. The ACMA may keep a document obtained under this section for as long as necessary for the performance of any of the ACMA's functions or exercise of its powers under the Determination or the Act.

The ACMA may also disclose information or documents as permitted by Part 7A of the *Australian Communications and Media Authority Act 2005*, or any other law.

Section 7.5 ACMA to provide information to ACCC on request

This section requires the ACMA to provide specified information to the ACCC, where the ACCC has requested the information in relation to any applicant or bidder. Information that may be requested includes forms and deeds submitted by an applicant during the auction process, information about an applicant's affiliations, and information about any breach of confidentiality obligations. It also includes information about bidding during the auction and information about the outcome of procedures set out in Part 6.

Section 7.6 Retention of eligibility payment or enforcement of deed for breach of auction procedures

This section sets out the action that the ACMA may take where a breach of the auction rules or related procedures is identified. The ACMA may take action where it is satisfied that an applicant or bidder, or a related person, breached a provision of the Determination, and that the breach affected or could have affected the outcome of the auction. The ACMA may also take action where:

- > a winning bidder fails to pay the balance of the winning price required under section 6.8;
- > a winning bidder fails to give a statement about affiliates under section 6.3;
- > the ACMA is satisfied that there has been a breach of the confidentiality obligations under section 3.2 after the auction period, but while the confidentiality obligations remain in force;
- > is satisfied that the bidder was affiliated with another bidder during the auction period; or
- > an applicant or bidder fails to comply with a requirement in a notice given under subsection 7.3(1).

In these circumstances, the ACMA may retain an eligibility payment, or enforce a deed of financial security given by an applicant or bidder under section 4.14. If the ACMA decides to take action under

this section, it must notify the applicant or bidder of this decision in writing, providing information about the nature of the breach.

Any amount retained or obtained by the ACMA under this section is forfeited to the Commonwealth unless the Federal Court orders its return under section 7.8.

Section 7.7 Effect of retention on winning bidders

This section provides that if the ACMA makes a decision under subsection 7.6(1) to retain an eligibility payment or enforce a deed of financial security provided by a winning bidder, it must not issue a spectrum licence to the bidder, and the spectrum won by the bidder will be taken to be unallocated.

Section 7.8 Application to Federal Court for return of retained amount

This section explains that where an applicant or bidder is notified by the ACMA of its intention to retain an eligibility payment, or enforce a deed of financial security under subsection 7.6(2), it may apply to the Federal Court for return of the amount. The Court may order the return of all or part of the amount, if not satisfied that the breach alleged by the ACMA has occurred, or if it considers that retaining the full amount of the payment would be disproportionate. Section 7.8 cannot be used as a basis for an order that a spectrum licence be issued to an applicant or bidder.

An applicant or bidder who has been notified by the ACMA under subsection 7.6(2) may apply to the Federal Court within 1 year of receiving the notice.

Section 7.8 does not remove any existing jurisdiction of a court and is not intended to abrogate or affect the operation of any of the ordinary rules of administrative law.

Section 7.9 Liability of ACMA

This section excludes the ACMA's, the auction manager's or the Commonwealth's liability in respect of damages or costs arising from any act or omissions of any person in relation to the auction procedures set out in this Determination.

Section 7.10 Other rights not affected

This section makes it clear that the Determination does not limit any right of action or remedy that the ACMA or the Commonwealth may have against any person.

Section 7.11 Auction manager may delegate functions and powers

This section provides that the auction manager may delegate any of its functions and powers under the Determination to another person. Any such delegation must be made in writing.

SCHEDULE 1 AUCTION RULES

This Schedule describes the detailed rules for conducting the auction, including procedures that are referred to in sections 5.3, 5.4, 5.5 and 5.6 of the Determination.

The Schedule is comprised of four Parts which deal separately with the rules applicable to the:

- clock rounds in the allocation stage (Part 1)
- supplementary round in the allocation stage (Part 2)
- determination of results of the allocation stage (Part 3)
- assignment stage (Part 4).

Part 1 Clock rounds

Part 1 of Schedule 1 describes in detail the rules that will apply during the clock rounds in the allocation stage of the auction.

Schedule for clock rounds

This section is comprised of clauses 1 to 6 in Schedule 1. These clauses set out when clock rounds will be held and the rules for determining the timing and duration of clock rounds. It also specifies information that must be provided to bidders prior to each clock round regarding the scheduling of rounds, and other important bidding details.

Clock rounds must only occur on a working day (as defined in the Determination) and will start and finish between 9 am and 5 pm based on the time in Victoria. This section does not limit the number of clock rounds that can be held on any day. It also states that there is no minimum or maximum duration of each round, or the interval between rounds. The auction manager will have the discretion to schedule clock rounds according to this section.

All bidders will be notified via the auction system of the anticipated schedule of rounds for a given day a minimum of one hour before the first clock round of the day. Clause 5 of the Schedule allows the auction manager to alter the daily schedule of clock rounds. However, if this occurs, the auction manager must inform bidders as soon as it is practicable.

Before each round starts, the auction manager must use the auction system to inform each bidder of the start and end time of the round, the price for lots in each product in that round and the number of eligibility points that the bidder will have in the upcoming round.

Prices in clock rounds

This section is comprised of clauses 7 to 10 in Schedule 1. These clauses describe how the prices for lots will be set in the first clock round and the rules governing how they will change during any subsequent clock rounds.

The prices set for lots of each product in the first clock round (the **initial prices**) will be the amounts set in accordance with paragraph 4.6 (1)(c) of the Determination. These will be published on the ACMA's website prior to the eligibility deadline.

For subsequent clock rounds, the prices for lots in a product will rise between rounds only where there is excess demand for that product. That is, when the total number of lots bid for is greater than the

number of lots available for that product, the price of lots in that product will increase in the next round. The price of lots of a product where demand is no greater than supply will remain unchanged between rounds.

Where prices increase between rounds, the auction manager has the discretion to set the amount of the increment. This discretion will include the ability to increase prices by different amounts for different products, and by different amounts for the same product across different clock rounds.

For example, between rounds two and three, the price of national 700 MHz band lots may rise by \$1,000, whereas Metro Sydney lots in the 2.5 GHz band may rise by \$300. Then between rounds three and four, the price of national 700 MHz band lots could rise by \$850 while the Metro Sydney 2.5 GHz band lots could go up by \$200.⁴

The price for a product will not fall between rounds (however, if the auction is restarted from a previous round under the exceptional circumstances provision in section 5.8 of the Determination, it will restart at the prices from that round).

Eligibility points

This section is comprised of clauses 11 and 12 in Schedule 1. These clauses describe how the number of eligibility points of each bidder will be set or calculated during the clock rounds.

The eligibility points of each bidder at the beginning of the auction will be the number of initial eligibility points that they have secured by appropriate payment or deed of financial security under section 4.14 of the Determination.

A bidder's eligibility points in any subsequent clock rounds will be affected by the value, in eligibility points, of the packages that they bid on. A bidder's eligibility points for a round will remain the same as the previous clock round if it bid on a package with the same eligibility point value as the eligibility points the bidder had for the previous round. If the package bid for in the clock round had a lower eligibility point value than the package bid for in the previous clock round, this lower value will become the bidder's new number of eligibility points in the next round. Bidders cannot increase their eligibility points between rounds.

The number of eligibility points that a bidder has will affect the size and composition of the packages that they can bid on in the clock rounds, in conjunction with the activity rules set out in clauses 17(d) to 20 of Schedule 1.

This section contains a note to clarify that a bidder can only bid in a clock round if they have eligibility points remaining. If a bidder has zero eligibility points in a round, the bidder may not bid in that clock round or any subsequent clock round (see clause 13). However, bids made in previous clock rounds will still be considered valid bids.

Clock round bids

This section is comprised of clauses 13 to 16 in Schedule 1. These clauses describe who can bid, what a bid consists of, how a bid can be changed during a clock round and what bids will be considered binding.

Any bidder who has eligibility points remaining is entitled to bid in a clock round.

Each clock round bid will consist of the number of lots in each product selected by the bidder (only whole numbers of lots can be bid on) and the total cost of that package in the current round (prices for lots in the current round will be displayed to bidders). The auction system will calculate the cost of

⁴ These dollar amounts are for illustrative purposes only, and do not reflect the likely bid increments in the auction.

each package bid on in the clock rounds. A bidder can elect to place no bids, or make a bid for zero lots in a round if they wish.

A bidder can change, delete or replace a valid bid during the bidding period of a round as many times as they wish. If a bidder wishes to modify a bid in a round, the bidder will need to save a new valid bid before the bidding period ends. Their previous valid bid will remain in the auction system until a new valid bid is saved. The new valid bid will override any previous valid bids. If a bidder has already made a valid bid in a round for a positive number of lots, but then wishes not to bid on any lots in the same round, the bidder will need to save a new valid bid for zero lots before the end of the round.

A bidder, provided that they have eligibility points remaining, can only make one bid per clock round. The bid made will be the last valid bid saved in the auction system during the bidding period of each clock round.

If a bidder places no valid bid in a clock round, that bidder is considered to have placed a bid for zero lots in all products. The bidder's eligibility points will drop to zero and they will be unable to bid in any further clock rounds.

Validity of clock round bids

This section is comprised of clauses 17 to 20 in Schedule 1. These clauses describe in detail the criteria that each bid in the clock rounds must meet in order to be considered a valid binding bid.

For a bid to be valid, the number of lots bid for in each product must not be more than is available in that product. The total size of the lots bid on within each category (in terms of MHz) also cannot exceed the allocation limits set in section 2.1 of the Determination.

Furthermore, the bid needs to satisfy one of three conditions set out in clause 17(d). That is, it either needs to:

- be less than or equal to the bidder's eligibility points for that round; or
- satisfy the revealed preference constraint and not exceed the bidder's initial eligibility points; or
- it needs to satisfy clause 17(d)(iii) – the effect of clause 17(d)(iii) is that a bid may still be valid if it violates both the eligibility point constraint and the revealed preference rules if the bid in the previous clock round included at least one lot of the 700 MHz product, and the current bid does not include more lots than the bid in the previous clock round for each product (in both bands).

This means that bidders can bid for packages of lots that are larger than their eligibility would allow, provided that it is not relatively more expensive than packages bid on in any previous eligibility reducing rounds. However, the eligibility points of a bidder who places such a bid will remain unchanged for the next clock round. Bidders cannot increase their eligibility points between rounds.

The bid reduction restriction rule outlined in clauses 19 and 20 in Schedule 1 operates to prevent a bidder from significantly reducing their demand for lots of the 700 MHz product during the clock round. This reduces the possibility of strategic manipulation. Bidders bidding on three or more lots of the 700 MHz band in the previous clock round cannot reduce their bids to fewer than two lots in the current clock round. In addition, if supply of 700 MHz lots was equal to or greater than demand in the previous clock round (meaning the price clock has not advanced), all bidders in the subsequent round must bid for at least as many 700 MHz lots as they did in the current round.

Valid bids must be received between the start and end time of the round, subject to the operation of section 5.7 of the Determination. This section gives the auction manager discretion to accept bids after

the end of a clock round if they are satisfied that a bidder could not enter a bid into the auction system during that clock round.

Information available during the clock rounds

This section comprises clauses 21 to 23 in Schedule 1 of the Determination and describes the information that will be revealed to bidders during the clock rounds. This information supplements the information provided to bidders under the section 'Schedule for clock rounds' in Schedule 1 of the Determination.

During the interval between each clock round, the auction system will show all bidders the total number of lots (aggregate demand) in each product that were bid for in the previous clock round. The auction system will also tell each bidder the package it bid for in the previous round, and the respective bid prices. Through the auction system, a bidder will also be able to see the aggregate demand for each previous clock round, as well as the package (and bid price) that they have bid on in each previous round.

After the final clock round, the auction system will inform each bidder of the demand for each product in the final clock round (that is, the number of lots bid for in each product). It will also make available to each bidder the package and price of their bid in the final clock round.

Bidders will not be given information during the allocation stage of the auction that will specifically identify individual bids from any other bidder.

End of clock rounds

This section is comprised of clause 24 in Schedule 1 and determines when the clock rounds will end.

The clock rounds will end in the round when the number of lots bid for in each product is equal to or less than the available number of lots in each product.

Bidding remains open on all products until the final clock round ends. However, the final clock round cannot be identified in advance. It can only be determined once the round has ended and the bids placed are found to meet the conditions for the final clock round.

At the culmination of the final clock round, the auction manager will notify each bidder that there will be no more clock rounds and that the auction will proceed to the supplementary round.

Part 2 Supplementary round

Part 2 of Schedule 1 describes in detail the rules that will apply during the supplementary round in the allocation stage of the auction.

Schedule for supplementary round

This section is comprised of clauses 25 to 28 in Schedule 1. These clauses set out when the supplementary round will be held and the rules for determining the scheduling of this round and informing bidders of its timing.

The supplementary round must only occur on a working day (as defined in the Determination) and will not begin until at least one full working day after the end of the final clock round. It must be held between 9 am and 5 pm based on the time in Victoria.

This section states that, subject to these scheduling restrictions, the auction manager has discretion over the starting time and duration of the supplementary round.

The auction manager must inform bidders of the timing of the supplementary round at least one hour before it starts. This will occur using the auction system.

Supplementary bids

This section is comprised of clauses 29 to 35 in Schedule 1. These clauses describe the general rules for making supplementary bids. Specific criteria for supplementary bids to be considered valid are set out in clauses 36 and 37.

All lots are available for bidding in the supplementary round. Any bidder that bids for at least one lot in the first clock round may submit bids in the supplementary round, but there is no requirement for a bidder to submit any supplementary bids.

As in the clock rounds, a bid in the supplementary round consists of the number of lots of each product that are being bid for (with only whole numbers of lots able to be bid on) and a total price for the package of lots in the bid. Unlike the clock rounds, though, where prices are set by the auction manager, the dollar amount of each supplementary bid (the bid price) is chosen by the bidder, provided that it is a whole multiple of the minimum supplementary price increment set by the auction manager. For example, if the minimum price increment is \$1,000, then a supplementary bid must be a multiple of \$1,000.

A bidder can submit as many supplementary bids as they like, subject to the supplementary bid limit made under section 4.16 in the Determination. Packages bid for may have some products and lots in common; however, the collection of supplementary bids from a bidder must not include more than one bid for the same package. If a bidder tries to submit more than one bid on the same package, the auction system will ignore all but the highest bid.

A bidder can change, delete or replace a bid during the bidding period of a round as many times as they wish. However, the supplementary round bids that will be binding will be the collection of bids (if any) that are saved in the auction system at the end of the supplementary round.

In addition to the bidding constraints here, all supplementary bids submitted to the auction system are subject to the rules setting out the criteria for valid supplementary bids in clauses 36 and 37. Bids are also subject to the data validation checks performed by the auction system (the checks will test whether the collection of supplementary bids is valid).

Validity of supplementary bids

This section is comprised of clauses 36 and 37 in Schedule 1 and describes the criteria that each supplementary bid must meet for the collection of supplementary bids to be valid.

To be valid, the bids must be received between the start and end time of the round, subject to the operation of section 5.7 of the Determination. This section gives the auction manager discretion to accept bids after the end of a round (including the supplementary round) if they are satisfied that a bidder could not enter a bid into the auction system during that round.

For a supplementary round bid to be valid, the number of lots bid for in each product must not be more than is available in that product.

Supplementary round bids will also be subject to the following constraints:

- bids can only be made for whole numbers of lots;
- the bid price of each bid must:
 - be at least the sum of the initial (i.e. reserve) prices for all lots in the package;
 - be in multiples of the minimum supplementary price increment set by the auction manager;

- be at least as much as any bid the bidder made for the same package in the clock rounds; and
- if the bid is for a package other than the package that the bid for in the final clock round, satisfy the revealed preference cap set out in clause 37 of Schedule 1.

In the supplementary round the revealed preference cap restricts the amount a bidder can bid for on a particular package. This cap requires that supplementary round bids are consistent with the preferences revealed by clock round bids and other supplementary round bids. A bidder can bid any amount on the package that it bid for in the final clock round. For other packages, the bid in the supplementary round must not be relatively more expensive than the package that was bid on in the last clock round the bidder was eligible to bid for the package.

- a bidder cannot submit a supplementary bid for a package that:
 - includes a total size of lots in a category (in terms of MHz) that exceeds the allocation limits set in section 2.1 of the Determination; or
 - has an eligibility point value that exceeds the bidder's initial eligibility.

During the supplementary round, the auction system will identify whether any bids in a collection of supplementary bids submitted are invalid, and notify the bidder of which bids are invalid. It will also suggest methods of making those bids valid (e.g. by changing the amount bid for other packages, to satisfy the revealed preference constraint); however, there may be other ways in which the bidder can make those bids valid. Bidders should seek their own advice in selecting a combination of valid bids, and not rely solely on the methods suggested by the auction system.

Part 3 Completion of allocation stage

After the clock rounds and supplementary rounds have ended, the auction manager will determine the winning bids for the allocation stage, and the allocation price of each winning bid. Part 3 of Schedule 1 describes in detail the rules for determining winning bids and their allocation prices.

Determination of winning allocation stage bids

This section is comprised of clauses 38 to 46 in Schedule 1. These clauses describe what bids are considered and how winning allocation stage bids are decided.

After the supplementary round has ended, the auction manager must determine the winning bids for the allocation stage. This will be done using the auction system. The bids used to determine the allocation stage winners are the last bids saved before the end of each clock round and the supplementary round. Reserve bids taken to have been made for each lot being auctioned will also be considered.

The winning allocation stage bids will be the combination of valid clock and supplementary round bids (and, potentially, reserve bids) that maximise the sum of the bid prices.

For example, assume there are two products being offered (A and B) and three bidders (b1, b2 and b3) are competing:

- b1 only wants Product A, and is willing to pay \$28 for it
- b2 only wants Product B, and is willing to pay \$20 for it
- b3 wants both Products A *and* B, and is willing to pay \$30 for the package.

Table 1: Example allocation stage bidding scenario

	b1	b2	b3
Product A	\$28		\$30
Product B		\$20	

Allocating Product A to b1 and Product B to b2, would produce a total bid price of \$48. If both products were allocated to b3, this would produce a total bid price of \$30. In this example then, Product A would be allocated to b1 and Product B would be allocated to b2, as this maximises the sum of the bid prices.

Determining the winning combination of bids must satisfy two conditions. First, the winning combination must not include more lots in any product than there are available in the auction. Second, the winning combination must not include more than one allocation stage bid from each bidder.

Although unlikely, it is possible that more than one combination of bids may meet the winning bid criteria. If this occurs, the tie-breaking rules set out in clauses 43 to 44 of Schedule 1 will apply. If more than one combination of bids after clauses 43 and 44 are applied, then the auction system will use a computerised random selection process to determine winning bids from the bid combinations that satisfy the conditions in clause 44.

Clause 46 provides that if reserve bids are included in the combination of winning allocation bids, the lots for which the reserve bids were taken to have been made will be considered unallocated lots.

This process will determine how many *generic* lots of each product that each successful bidder has won. However, the specific frequencies to be assigned to each set of generic lots will not be determined until the assignment stage.

Determination of allocation prices

This section is comprised of clauses 47 to 51 of Schedule 1. These clauses explain how the price of each winning allocation stage bid is calculated.

The allocation price for each bid in the winning combination of allocation bids at this point must be at least the price of the package calculated using the prices of lots in the first clock round prices (the reserve prices for those lots). However it must be no more than the bidder bid for the package it has been allocated. Subject to these constraints, the prices will be calculated by the auction system according to the conditions and formula set out in clauses 48 to 50 of Schedule 1, which apply a weighted Nearest–Vickrey–Core pricing rule.

Under the weighted Nearest–Vickrey–Core pricing rule the bidder pays a price less than its bid price. There are a number of steps to determine this price. First, the Vickrey price for each bidder is calculated. The Vickrey price is calculated by taking the winning bidder’s package bid price, and subtracting the difference between the highest value package combination, and the highest value package combination that can be formed without the winning bidder. If no other bidder or group of bidders has offered a bid price higher than the Vickrey price, then it is the valid allocation price. If not, the price must be raised from the Vickrey price to satisfy that condition. That is, the price is raised by the minimum amount required to defeat other bidders on the package. When this price adjustment is required for a number of bidders the price increase is shared between bidders proportional to the reserve prices of their winning packages. The resulting allocation price will be at least as much as the sum of the initial prices for the lots, and no more than the amount offered by the winning bidder for the lots in the package.

As a result, the weighted Nearest–Vickrey–Core price for a package must be the smallest amount⁵ that is:

- smaller than the amount bid for the package⁶
- at least the initial price for the package⁷
- at least the amount by which the package has suppressed the quantity won by the other bidders (Vickrey price)⁸
- at least sufficient so that the total amount paid by all the winning bidders is not less than the amount an alternative bidder or group of bidders would be prepared to pay (Core price)⁹

The allocation prices will be rounded up to the nearest whole dollar.

Part 4 Assignment stage

The assignment stage is used to award specific frequencies to the winners of generic lots identified at the completion of the allocation stage. Part 4 of Schedule 1 describes in detail the rules for assigning specific frequencies to lots won in the allocation stage and for calculating the assignment prices payable by bidders for spectrum.

Schedule for assignment rounds

This section is comprised of clauses 52 to 59 in Schedule 1. These clauses set out when assignment rounds can be held and what products can be assigned in each round. It also specifies information that must be provided to bidders prior to the start of the assignment stage and before each assignment round.

Assignment rounds must only occur on a working day (as defined in the Determination) and will not begin until at least one full working day after the end of the allocation stage. Assignment rounds must be held between 9 am and 5 pm based on the time in Victoria.

There will be at least two assignment rounds. The first round will assign frequencies to all lots in the 700 MHz band product only. The next round, and any subsequent rounds, will assign frequencies to products in the 2.5 GHz band. Assignment rounds for the 2.5GHz band can include multiple products; however, all lots of a product must be assigned in a single round.

Subject to the scheduling and operational restrictions in clauses 54, 58 and 59, the auction manager has discretion over the duration of each assignment round, the number of rounds per day, and the products that will be assigned in each round. However, before the assignment rounds begin the auction manager must announce the anticipated schedule of assignment rounds and the products that will be assigned in each round. The auction manager must also announce the start and end times of a round at least one hour before the round starts. Announcements will be made using the auction system.

Frequency range options in assignment rounds

This section is comprised of clauses 60 to 64 of Schedule 1. These clauses explain how the set of frequency ranges options available to bidders for lots won in the allocation stage will be determined. They also specify who is entitled to bid in the assignment stage and information that must be provided to bidders.

5 the minimisations in Clause 50 and Clause 49(b)

6 Clause 48(b)

7 Clause 48(a)

8 Part of clause 50

9 Clause 49(a)

Only bidders who have won lots of a product in the allocation stage are eligible to bid in the assignment round for that product. When the assignment round for a product commences, the auction manager must provide each bidder with a list of the frequency range options for the lots of a product that are available to that bidder. The frequency range options will be made available using the auction system, and will be set so that:

- > lots that were won by the bidder in the allocation stage are adjacent in terms of frequency (i.e., if a bidder won three lots of a product in the allocation stage, then all the options available for that bidder in the assignment round will group the three lots together);
- > there exists at least one frequency range option for every bidder;
- > none of the frequency ranges overlap between different bidders' frequency range options; and
- > lots that were not allocated in the allocation stage will be adjacent to one another in terms of frequency (e.g. if there are three unallocated lots of a product in the allocation stage, then all the options available for all bidders in the assignment round will be such that the three unallocated lots are grouped together).

Where two or more products are assigned in a single round, the auction manager has discretion to offer frequency range options available to each bidder that deal with all the products as a single group. For this to occur, the set of frequency options offered must also still comply with conditions set out in clause 61 of Schedule 1 (listed above).

For example, each winning bidder may secure the same number of 2.5 GHz band lots in the Metro Melbourne and Regional East Australia regions in the allocation stage. In this case, the auction manager may assign all 2.5 GHz band lots in those two regions in a single group in the same assignment round. Bidders would be able to bid on the same frequency range options for their generic lots in both regions. In this scenario, even if a bidder did not receive their preferred frequency assignment, they would still be assured that all of their lots would have the same frequency range in the Metro Melbourne and Regional East Australia regions.

If the assignment round is for a single product, all frequency range options that are consistent with clause 61 will be made available to a bidder. If the assignment round is for more than one product, a smaller set of frequency range options may be made available to a bidder so as to provide a level of contiguity of spectrum across products for bidders.

Offering frequency range options to a group of products is intended to improve the likelihood of providing geographic contiguity to bidders, as they would be able to acquire lots across contiguous regions with the same frequency ranges. Such frequency and geographic contiguity is expected to facilitate the efficient use of spectrum by new licensees.

Assignment bids

This section is comprised of clauses 65 to 69 in Schedule 1. These clauses describe what an assignment bid consists of, what a bidder can bid on, how a bid can be changed during an assignment round and which bids will be considered binding.

An eligible bidder may only submit a bid for a frequency range option that is made available to them through the auction system. Each valid bid must include a bid price for a frequency option in accordance with clause 70 of Schedule 1. Bidders can bid on more than one frequency range option within a round, showing their order of preference by the amounts bid. However, bidders are not obliged to place a bid in any assignment round.

A bidder can change, delete or replace a bid during the bidding period of an assignment round as many times as they wish. If a bidder wishes to modify a bid in a round, the bidder will need to save a new bid for that frequency range option before the bidding period ends. Their previous saved bid on a

frequency range option will remain in the auction system until a new bid for that option is saved. The new bid will override any previously saved bids. If a bidder decides not to bid for a frequency range option after they have saved a bid on that frequency range option, the bidder will need to save a new bid for zero dollars on that option before the round ends.

A bidder is taken to have bid zero dollars on each frequency range option that it does not place a valid assignment bid on. If a bidder places no assignment bids at all during the assignment stage, that bidder is considered to have bid zero dollars for every frequency range option. The last bid saved in a round (or taken to have been made if a bidder does not make a bid) will be the set of bids that are binding.

Validity of assignment bids

This section is comprised of clause 70 in Schedule 1. It sets out the conditions for valid bids during the assignment rounds that will be considered in determining winning assignment bids.

To be valid, an assignment bid must be:

- > received between the start and end time of the assignment round for the product
- > be for a frequency range option made available to the bidder; and
- > a bid price that is a whole multiple of the dollar amount that the auction manager sets as the minimum bid increment for assignment round bids.

During each assignment round the auction system will identify whether a bid is invalid, notify the bidder if that is the case and not save it.

Determination of winning assignment bids

This section is comprised of clauses 71 to 74 in Schedule 1. These clauses explain the rules for deciding the winning assignment stage bids.

The auction manager must determine the winning assignment bids for each product or group of products after the round in which they were bid on.

The set of winning bids for each assignment round will be a combination of valid bids that maximises the sum of the amounts bid subject to a set of conditions. All bids saved during the relevant assignment round will be considered, including bids for zero dollars that are taken to have been made under clauses 68 or 69.

The conditions that the set of winning bids must meet include the following:

- > Only one bid is selected from each bidder
- > There is no overlap between the frequency ranges for each product included in any pair of winning bids; and
- > Unallocated lots of a product are adjacent to each other.

The auction system will use a computerised random selection process to determine winning bids if more than one combination of bids meet the above criteria.

Determination of assignment prices

This section is comprised of clauses 75 to 81. These clauses explain how the price of each winning assignment stage bid is calculated in each round.

The auction manager must determine the assignment price for each winning bid in an assignment round. The auction system will be used to calculate these prices according to the rules set out here in clauses 76 to 81.

The assignment price in a round will be zero if there is only one bidder in that round. For a round with more than one bidder the assignment price for each bid in the winning combination of assignment bids may be zero but can be no more than the price bid.

Subject to these constraints, the prices will be calculated according to the conditions and formula set out in clauses 79 and 80 of Schedule 1, which apply a weighted Nearest–Vickrey–Core pricing rule.

Under the weighted Nearest–Vickrey–Core pricing rule the bidder pays a price less than its bid price. There are a number of steps to determine this price. First, the Vickrey price for each bidder is calculated. The Vickrey price is calculated by taking the winning bidder’s assignment bid price, and subtracting the difference between the highest value combination of assignment bids and the highest value package combination of assignment bids that can be formed without the winning bidder. If no other bidder or group of bidders has offered a bid price higher than the Vickrey price, then it is the valid assignment price. If not, the price must be raised from the Vickrey price to satisfy that condition. (That is, the price is raised by the minimum amount required to defeat other bidders on the frequency assignments). When this price adjustment is required for a number of bidders the price increase is shared between bidders proportional to the reserve prices of their winning packages.

As a result, the weighted Nearest–Vickrey–Core price for a package must be the smallest amount¹⁰ that is:

- smaller than the amount bid for the package¹¹
- at least the amount by which the package has suppressed the quantity won by the other bidders (Vickrey price)¹²
- at least sufficient so that the total amount paid by all the winning bidders is not less than the amount an alternative bidder or group of bidders would be prepared to pay (Core price)¹³

Assignment prices will be rounded up to the nearest whole dollar.

10 the minimisations in Clause 80 and Clause 79(b)

11 Clause 77

12 Part of clause 80

13 Clause 79(a)

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Radiocommunications (Spectrum Licence Allocation – Combinatorial Clock Auction) Determination 2012

The parts of this legislative instrument that are subject to section 42 (disallowance) of the *Legislative Instruments Act 2003* are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

On 1 November 2011, the Minister for Broadband, Communications and the Digital Economy made the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011* and the *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2011* (the re-allocation declarations) under section 153B of Part 3.6 of the *Radiocommunications Act 1992* (the Act).

The re-allocation declarations make the parts of the spectrum from:

- (a) 703 MHz to 748 MHz; and
- (b) 758 MHz to 803 MHz; and
- (c) 2500 MHz to 2570 MHz; and
- (d) 2620 MHz to 2690 MHz,

in the areas set out in the re-allocation declarations, subject to re-allocation by issuing spectrum licences.

Under subsection 60(1) of the Act, the Australian Communications and Media Authority (the ACMA) must determine the procedures for allocating spectrum licences by auction, tender or for a pre-determined or negotiated price. This legislative instrument is the determination required by that section.

Under subsection 294(1) of the Act, the ACMA may also make determinations fixing spectrum access charges payable by licensees for issuing spectrum licenses and specifying the time when spectrum access charges are payable. To the extent that this legislative instrument fixes the spectrum access charges payable by licensees for issuing spectrum licenses as a result of the auction and the timing of such payments, this legislative instrument is also a determination made under subsection 294(1) of the Act.

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 *Legislative Instruments Act 2003* applies, to cause a statement of compatibility to be prepared in respect of that legislative instrument.

To the extent that the legislative instrument is a determination under subsection 60(1) of the Act, the instrument is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*. This is because:

- (a) item 35 in subsection 44(2) of the *Legislative Instruments Act 2003* provides that instruments made under subsection 60(1) of the Act will not be subject to disallowance, unless the instrument is subject to disallowance under its enabling legislation or by the means of some other Act; and

- (b) the Act does not provide for an instrument made under subsection 60(1) to be subject to disallowance.

To the extent that this legislative instrument is a determination under subsection 294(1) of the Act, this legislative instrument is subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

This statement of compatibility has been prepared only with respect to those parts of the legislative instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies, that is, the parts that are made under subsection 294(1) of the Act.

Human Rights Implications

The parts of this legislative instrument that are subject to section 42 (disallowance) of the *Legislative Instruments Act 2003* do not engage any of the applicable rights or freedoms.

Conclusion

The parts of this legislative instrument that are subject to section 42 (disallowance) of the *Legislative Instruments Act 2003* are compatible with human rights as they do not raise any human rights issues.

The Australian Communications and Media Authority