Explanatory Statement

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Limits—Regional 1800 MHz Band) Direction 2015

Issued by the Authority of the Minister for Communications

Legislative Authority

The *Radiocommunications (Spectrum Licence Limits—Regional 1800 MHz Band) Direction 2015* (the Direction) is made by the Minister for Communications under subsection 60(10) of the *Radiocommunications Act 1992* (the Act).

Purpose

The purpose of the Direction is to require the ACMA to allocate no more than 25 MHz of paired spectrum to any person or specified group of persons for the two parts of the spectrum which are subject to re-allocation under Part 3.6 of the Act: 1725-1785 MHz and 1820-1880 MHz in regional Australia (the regional 1800 MHz band).

There is demand to use the regional 1800 MHz band for mobile broadband services. Currently, the regional 1800 MHz band is predominantly used for fixed services that are authorised under apparatus licences. The Minister has made the *Radiocommunications (Spectrum Re-allocation—Regional 1800 MHz Band) Declaration 2015* (the Re-allocation Declaration) under section 153B of the Act to facilitate the regional 1800 MHz band to be re-allocated for mobile broadband use. Apparatus licences will be cancelled inthe regional 1800 MHz band so that spectrum licensing can be introduced.

The ACMA is planning to hold an auction in November 2015 for spectrum in the regional 1800 MHz band. The spectrum will be re-allocated under spectrum licencing arrangements. Spectrum licensing will facilitate the most efficient allocation and use of the spectrum and will provide licensees with the flexibility and security of tenure needed to encourage investment in infrastructure. Spectrum licences may be issued for a term of up to 15 years. The ACMA is proposing that all 1800 MHz spectrum licences have a common expiry date of June 2028, which aligns with the expiry date of existing spectrum licences in the 1800 MHz band.

The 1710-1725 MHz and 1805-1820 MHz frequency range in regional Australia is already used for mobile broadband services with spectrum licences held by Telstra and Vodafone Hutchison Australia (VHA). In metropolitan Australia the 1800 MHz band is used for mobile broadband services with spectrum licences held by Telstra, Optus, VHA and state rail organisations.

Demand for spectrum is increasing as the demand for mobile data services continues to increase. Spectrum in the 1800 MHz band is highly desirable for mobile broadband as it is used internationally for Long Term Evolution (LTE), or 4G, technology.

Given the increasing demand for spectrum, the desirability of 1800 MHz spectrum and the long tenure of spectrum licences, the Department of Communications sought advice on the Minister's behalf from the Australian Competition and Consumer Commission (ACCC) on the need for competition limits.

Competition limits are used to prevent a single party from monopolising the spectrum at the expense of competition and outcomes for consumers. A monopoly could entrench market dominance, with subsequent negative impacts on consumers in terms of service availability, quality and pricing.

The ACCC undertook public consultation to assist with its advice. The ACCC provided its advice to the Minister on 18 May 2015.

Consistent with the ACCC's advice, the Minister has decided to impose competition limits of 2 x 25 MHz on the allocation of spectrum licences in the regional 1800 MHz band. This limit will apply to all prospective auction participants.

Competition limits of 2 x 25 MHz are intended to prevent monopolisation of the spectrum, provide prospective auction participants with flexibility, enhance competitive tension at auction and reduce the possibility of unsold spectrum following the auction.

Background

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

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

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

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

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

This Direction is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA), but it is not subject to disallowance or sunsetting due to sections 44 and 54 of the LIA respectively.

Regulation Impact Statement

The Office of Best Practice Regulation has agreed that a Regulation Impact Statement is not required for the Direction.

Statement of Compatibility with Human Rights

This statement of compatibility is prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

This Direction is compatible with human rights as it does not raise any human rights issues.

Consultation

The ACCC invited submissions on whether competition limits should be imposed on spectrum licences for the regional 1800 MHz band. The ACCC invited submissions from 1 April until 17 April 2015. Five submissions were received. These submissions assisted the ACCC in developing its advice to the Minister on competition limits.

Notes on Sections

Section 1 – Name of instrument

Section 1 provides that the name of the Direction is the *Radiocommunications (Spectrum Licence Limits—Regional 1800 MHz Band) Direction 2015*.

Section 2 – Commencement

Section 2 provides that the Direction will commence on the later of immediately after the commencement of the re-allocation declaration and the start of the day after the Direction is registered on the Federal Register of Legislative Instruments. This is because the instrument relies upon concepts in the Re-allocation Declaration.

Section 3 – Interpretation

Subsection 3(1) defines terms used in the Direction.

The intention of the Direction is to prevent any one person or specified group of persons from acquiring spectrum in the forthcoming re-allocation of the regional 1800 MHz band in regional Australia. The intended result is that no one person or specified group of persons may hold more than 25MHz of paired spectrum of the total 60MHz of paired spectrum that is being made available for re-allocation. To ensure this objective is met and not circumvented by persons acting on behalf of others, the Direction imposes the limits on both persons and specified groups of persons.

'Re-allocation declaration' means the *Radiocommunications (Spectrum Re-allocation—Regional 1800 MHz Band) Declaration 2015*. This declaration requires the ACMA to commence a process of re-allocating the 1800 MHz band in regional Australia. 'Regional Australia' has the same meaning as in the Re-allocation Declaration.

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

'Relevant agreement' is defined for the purposes of the definition of 'associate' and captures agreements, arrangements or understandings irrespective of their level of formality or legal effect. Persons will be associates if they are parties to a relevant agreement of a particular type, as described in paragraph (c) of the definition of associate. The types of relevant agreements captured by paragraph (c) of the definition of associate are those which relate to the use by a party to the agreement of any part of the spectrum covered by the Re-allocation Declaration, or that relates to the acquisition of a spectrum licence for any part of the spectrum to which the re-allocation declaration applies.

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

A relevant agreement may include an agreement where:

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

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

'Roaming services agreements' captures agreements between carriers which enable customers (i.e. end-users) of one carrier to roam onto the mobile network of another carrier when the customer is outside the geographical coverage area of the first-mentioned carrier's network. Such use is for temporary periods of time. Such agreements are excluded to make it clear that such these arrangements are not captured by paragraph (c) of the definition of 'associates'. Previously when making competition limit directions, concern was raised that such agreements may be considered to be for the use of spectrum even though such arrangements only enable the customers of a carrier to temporarily use the spectrum of another carrier. This is not an arrangement which provides one carrier with exclusive use of another carrier's spectrum (so as to monopolise the spectrum band).

If the agreement between two carriers covers matters that extend beyond arrangements in relation to roaming for the use of the relevant spectrum, there will be a risk that the agreement as a whole will be captured by paragraph (c) of the 'associates' definition and therefore limit the amount of spectrum that may be used by the respective parties.

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

The Direction would not restrict future trading in spectrum by a spectrum licensee pursuant to any other agreement entered into after the spectrum has been allocated,

although such trading will be subject to the acquisition provisions of the *Competition and Consumer Act 2010* (under section 50 of that Act).

The note to subsection 3(1) sets out a non-exhaustive list of terms relevant to the Declaration that are defined in the Act.

Subsection 3(2) provides that the lower number in a reference to a part of the spectrum is not included in that part of the spectrum, while the higher number is included. This is to prevent frequency band overlap.

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

A person who is an associate of an applicant for a spectrum licence, and who is also an associate of one or more other applicants for a spectrum licence, is a member in common for 2 specified groups of persons. For example, if a person was a director of one applicant for a spectrum licence, whilst also being a director of another applicant for a spectrum licence, both the applicants in question and all of their associates would be taken to be 1 specified group of persons. The limits set out in section 4 would apply to all such persons. For example, companies subject to a dual listed company arrangement (as defined in section 125-60 of the *Income Tax Assessment Act 1997*) would typically have 1 or more directors in common. Where applicant companies subject to a dual listed company arrangement do have directors in common, those directors would be members in common of each specified group under subsection 3(3) of the Direction, and those companies and their associates would be taken to be 1 specified group of persons for the purposes of the Direction.

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

Section 4 – Direction

Section 4 sets out the quantum limits that are to be included in the spectrum allocation procedures for the regional 1800 MHz band in regional Australia.

The section directs the ACMA to determine procedures under subsection 60(1) of the Act that impose limits to ensure that, as a result of the allocation of the 60 MHz of paired spectrum forming the regional 1800 MHz band in regional Australia, no person or specified group of persons may use more than 25 MHz of paired spectrum.

These limits fit within the parameters of the types of limits that may be imposed in accordance with subsections 60(5) and (6) of the Act.

The Direction only applies in relation to the ACMA's allocation of the regional 1800 MHz band in regional Australia as specified in the Re-allocation Declaration. Once the spectrum is allocated by the ACMA, the Direction will be spent.