

# EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

## *Radiocommunications (Spectrum Licence Allocation — 1800 MHz Band) Determination 2015*

### *Radiocommunications Act 1992*

#### **Purpose**

The *Radiocommunications (Spectrum Licence Allocation — 1800 MHz Band) Determination 2015* (the **Determination**) sets out the procedures to be applied in allocating spectrum licences in parts of the 1800 MHz band. The procedures include the auction rules in Schedule 1 to the Determination.

#### **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, by tender or by allocation for a pre-determined or negotiated price. 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**

##### *Previous 1800 MHz band allocations*

Spectrum licences in parts of the 1800 MHz band (1710 MHz – 1785 MHz and 1805 MHz – 1880 MHz) were previously auctioned for the 5 mainland State capital cities (2 x 75 MHz) and the other 3 capital cities and some regional areas (2 x 15 MHz) in 2 tranches. The auctions occurred as follows:

Tranche 1 in 1998 (licences expired on 17 June 2013)

- 1710 MHz – 1755 MHz paired with 1805 MHz – 1850 MHz for the 5 mainland State capital cities; and
- 1710 MHz – 1725 MHz paired with 1805 MHz – 1820 MHz for the other 3 capital cities and some regional areas;

Tranche 2 in 2000 (licences expired on 3 May 2015)

- 1755 MHz – 1785 MHz paired with 1850 MHz – 1880 MHz for the 5 mainland State capital cities.

The ACMA, under section 82 of the Act, re-issued the majority of spectrum licences issued as part of tranche 1 and as part of tranche 2. The ACMA has aligned the expiry dates of all of the re-issued spectrum licences such that they have the same expiry date of 17 June 2028.

##### *Current 1800 MHz allocation*

All the parts of the spectrum scheduled to be allocated in the 1800 MHz band in late 2015 by issuing spectrum licences are specified in the *Radiocommunications (Spectrum Re-allocation—Regional 1800 MHz Band) Declaration 2015* (the **re-allocation declaration**) and the *Radiocommunications (Spectrum Designation) Notice No. 1 of 2014* (the **designation notice**). These relevant spectrum lots are set out in the *Radiocommunications Spectrum Marketing Plan (1800 MHz Band) 2015* (the **marketing plan**).

For the re-allocation declaration, the lots have been determined as follows:

Category 1

12 lots of (each of 2 x 5 MHz) in the paired bands 1725 MHz – 1785 MHz and 1820 MHz – 1880 MHz in each of 12 areas comprising Canberra, Darwin and Hobart and 9 other regional areas (that is, 144 lots in total for category 1).

For the designation notice, the lots have been determined as follows:

Category 2

2 lots (each of 2 x 2.5 MHz) – one in each of regional South Australia and North Queensland (Cairns/Townsville) in the paired bands 1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz; and

Category 3

1 lot (of 2 x 5 MHz) in Adelaide in the paired bands 1770 MHz – 1775 MHz and 1865 MHz – 1870 MHz.

The spectrum in all 3 categories of the 1800 MHz band will be allocated together in a single allocation (either an auction and/or pre-determined price allocation). The auction will be conducted using an ascending bid simultaneous multiple round auction (SMRA) methodology.

**Allocation Determination operation**

The Determination is one of a set of legislative instruments that gives effect to the spectrum re-allocation declaration and designation notice for parts of the spectrum in the 1800 MHz band. The Determination is made under both section 60 and section 294 of the Act. Under section 60 of the Act, the Determination makes provision for how this spectrum will be allocated by a price-based method, namely an allocation by auction and/or pre-determined price. Under section 294 of the Act 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. The spectrum access charges are:

- for an auction – the highest final bid for each lot won by plus the bid withdrawal penalties (if any) for each lot imposed on a winning bidder (a spectrum lot then becomes the subject of a spectrum licence);
- for a pre-determined price allocation – the pre-determined price for each spectrum licence to be issued.

The Determination sets out, in detail, the procedures that will be used to conduct the allocation (either auction and/or pre-determined price). These include the requirements and responsibilities of applicants and the ACMA throughout the allocation process. The Determination also sets out rules to deter collusive behaviour and the potential consequences for breaches of these rules.

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 (LIA)*.

The Determination explains the application and registration processes for persons to become eligible to participate in the allocation and to bid for spectrum lots in the auction. Rules governing how applicants who become registered bidders can bid on spectrum lots in the auction are also provided.

The ACMA will allocate spectrum divided into lots as described in the marketing plan. Each lot is defined by a geographic boundary and frequency bandwidth. The marketing plan has been prepared

under both section 39 and section 39A of the Act. The marketing plan specifies the spectrum lots available and the conditions that will generally apply to operation of radiocommunications devices under the spectrum licences issued.

The auction will be conducted via a secure online system using SMRA methodology. In this type of auction, all bidders are able to bid on all elements of their preferred aggregations of lots at the same time. All the lots on offer are auctioned simultaneously, rather than in sequence. Bidders can bid on any lot, or any combination of lots, up to their own pre-declared limit and the limits imposed as a result of a direction given by the Minister under subsection 60(10) of the Act. Bidding is conducted over multiple rounds and the auction closes when there are no new bids on any of the lots for 2 consecutive rounds and no waivers to bid are exercised for 2 consecutive rounds in the final stage of the auction.

Spectrum licence allocation limits as directed by the Minister will apply in the course of this allocation process. These limits have the effect of capping the total amount of spectrum in parts of the 1800 MHz band that a single bidder can acquire. The effect of the *Radiocommunications (Spectrum Licence Limits—Regional 1800 MHz Band) Direction 2015* (the **spectrum licence limits direction**) and the Determination is that a bidder will be limited to a maximum of 25 MHz in each of the lower part of the 1800 MHz band (1725 MHz to 1785 MHz) and the upper part of the 1800 MHz band (1820 MHz to 1880 MHz) in each geographic area of regional Australia.

In addition, the Determination sets out the financial obligations to be met by successful bidders (or successful applicants at a pre-determined price) before the ACMA can issue spectrum licences, as well as requiring applicants to make an eligibility payment or give a deed of financial security, or a combination of both, to be registered as a bidder. The Determination also sets out the procedures for the ACMA to return any eligibility payments to unsuccessful bidders.

The ACMA has also made a determination regarding unacceptable levels of interference under subsection 145(4) of the Act, being the:

- *Radiocommunications (Unacceptable Levels of Interference – 1800 MHz Band) Determination 2012* (as amended);

and advisory guidelines for the 1800 MHz band under section 262 of the Act, being the;

- *Radiocommunications Advisory Guidelines (Additional Device Boundary Criteria – 1800 MHz Lower Band) 2012* (as amended);
- *Radiocommunications Advisory Guidelines (Managing Interference to Spectrum Licensed Receivers – 1800 MHz Band) 2012* (as amended); and
- *Radiocommunications Advisory Guidelines (Managing Interference from Spectrum Licensed Transmitters – 1800 MHz Band) 2012* (as amended).

The determination made under subsection 145(4) sets out unacceptable levels of interference that radiocommunications devices used under spectrum licences issued pursuant to the Determination and in accordance with the marketing plan must comply with. The advisory guidelines provide additional interference management measures and set out requirements for registering radiocommunications devices with the ACMA that will operate under spectrum licences in the 1800 MHz band.

### **Consultation**

The ACMA has been working collaboratively with stakeholders on how best to provide access to the spectrum in the 1800 MHz band. This has included developing arrangements with appropriate regard to stakeholder views. A summary of the public consultation undertaken, including links to all relevant information and documents, is available on the ACMA's website: [www.acma.gov.au](http://www.acma.gov.au).

In 2012, the ACMA commenced consultation with stakeholders and the public to identify appropriate future licensing arrangements in the regional 1800 MHz band that would balance the needs of both existing and prospective licensees. A significant number of apparatus licences had been issued authorising the operation of radiocommunications devices in the 1800 MHz band in regional Australia.

On 30 January 2013 the ACMA released a public consultation paper inviting submissions from interested stakeholders and the public on a proposed recommendation to the Minister that he designate (under section 36 of the Act) for allocation, by spectrum licensing, a number of frequency bands in the 1800 MHz band in specified areas that remained vacant after the re-issue of existing spectrum licences that had expired. The consultation period ended in March 2013 and submissions were received from the Australian Mobile Telecommunications Association (AMTA), Optus and Telstra. All submissions supported the ACMA's proposed recommendations.

On 4 March 2013, the ACMA released for public consultation '*Issues paper 2 – Spectrum licences in the 1800 MHz band*' which sought comment on the issue of spectrum licences, the ACMA's preferred licence type, for prospective operators in the 1800 MHz band in regional and remote Australia.

Responses to the consultation papers did not unanimously support spectrum licensing arrangements in the 1800 MHz band. For example: 3 carriers, who hold different amounts of spectrum in metropolitan and regional areas of the band, sought different outcomes; and 2 carriers sought spectrum licensing in the band but with different start dates, whilst another carrier preferred to maintain apparatus licensing in the band.

#### Category 1 lots

Given the lack of consensus for proposals to administratively issue apparatus licences, the ACMA undertook to expedite its preferred long-term plan for spectrum licensing of the 1800 MHz band in regional areas.

Accordingly, the ACMA undertook stakeholder and public consultation in February/March 2015 to allocate, via auction, spectrum licences in the 1800 MHz band in regional Australia. In this consultation, 8 written submissions were received addressing the draft terms of a recommendation relating to parts of the band.

On 26 May 2015, following recommendations made by the ACMA, the Minister made the re-allocation declaration under section 153B of the Act. The effect of the re-allocation declaration is that parts of the encumbered spectrum in the 1800 MHz band should be re-allocated by issuing spectrum licences.

Consequently, 2 x 60 MHz of spectrum is available in the 1800 MHz band for allocation in Canberra, Darwin and Hobart and in 9 other regional areas in the frequency bands 1725 MHz – 1785 MHz paired with 1820 MHz – 1880 MHz. These are the category 1 licences for this allocation.

#### Category 2 and 3 lots

As mentioned above, on 30 January 2013, the ACMA released a public consultation paper inviting submissions from interested stakeholders and the public on a proposed recommendation that the Minister designate for allocation by spectrum licensing: "any frequency ranges in the 800 MHz and tranche 1 of the 1800 MHz bands that remain vacant after the re-issue of existing spectrum licences that expire on 17 June 2013".

The ACMA received submissions from Telstra, Optus and AMTA all supporting the proposal. As a result of the re-issue process, 3 spectrum licences in the 1800 MHz band were not re-issued and expired, and therefore are available for allocation – these are Adelaide, regional South Australia and North Queensland (Cairns/Townsville). The consultation process suggested that there is a strong demand for this available spectrum. On 17 July 2013, the ACMA made a recommendation to the

Minister, under subsection 36(3) of the Act, to designate these as specified parts of the 1800 MHz band for spectrum licensing. The Minister made the designation notice on 29 January 2014.

Consequently, 3 lots are available for spectrum licensing and are divided into 2 categories, as follows:

Category 2 with 2 lots – one in each of regional South Australia and North Queensland (Cairns/Townsville)

2 x 2.5 MHz in the paired bands 1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz.

That is, a total of 5 MHz in each area.

Category 3 with 1 lot – Adelaide

2 x 5 MHz in the paired bands 1770 MHz – 1775 MHz and 1865 MHz – 1870 MHz.

That is, a total of 10 MHz in the area.

In preparation for the auction, the ACMA has developed the lot configuration and technical instruments for the allocation in consultation with stakeholders, particularly prospective participants and incumbent licensees.

### **Allocation determination**

Stakeholder views were also taken into account in the development of the Determination. During the preparation of a draft version of the Determination, the ACMA held an on-line industry forum on 4 March 2015, which presented stakeholders with details on preliminary approaches being considered for key parts of the spectrum allocation planning.

Draft versions of relevant instruments, including the marketing plan and the Determination, were subsequently released for detailed public consultation on 22 June 2015, together with an explanatory consultation paper.

The ACMA received three written submissions in response to the consultation paper. Submissions were published on the ACMA's website ([www.acma.gov.au](http://www.acma.gov.au)). Stakeholder views expressed in these submissions have also been taken into consideration in subsequent spectrum allocation planning. The 3 submitters agreed with the SMRA allocation format that the ACMA had proposed but each also put forward various suggestions that the ACMA should undertake some form of SMRA allocation for generic lots (rather than specific lots) followed by an assignment round where winning bidders could negotiate on the assignment of spectrum to the winning bidders by frequency and area which, in their opinion, would maximize the outcome for stakeholders.

Given the circumstances of this auction, the ACMA considered that the SMRA methodology applied for the specific lots without an assignment round is the most efficient and effective means to identify the highest value users of the parts of the spectrum in the 1800 MHz band.

### **Regulation Impact**

Prior to making the 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. This included providing information on the re-allocation declaration, designation notice and competition limits, as well as lot configuration. Based on preliminary assessments the OBPR has confirmed that these elements do not constitute a regulatory change at this time (OBPR reference IDs 19077 and 19214). Further engagement with the OBPR has indicated that all of the relevant regulatory assessments for the 1800 MHz band allocation have been acquitted.

## **Documents incorporated into the Determination by reference or otherwise referred to**

The Determination refers to Acts and other legislative instruments as in force from time to time (as permitted by section 13 of the LIA and subsections 314A(1) and (2) of the Act). These are:

- > *A New Tax System (Australian Business Number) Act 1999*
- > *Acts Interpretation Act 1901*
- > *Australian Communications and Media Authority Act 2005*
- > *Banking Act 1959*
- > *Competition and Consumer Act 2010*
- > *Corporations Act 2001*
- > *Insurance Act 1973*
- > *Legislative Instruments Act 2003*
- > *Radiocommunications Act 1992*
- > *Radiocommunications (Spectrum Designation) Notice No. 1 of 2014*
- > *Radiocommunications (Spectrum Licence Limits—Regional 1800 MHz Band) Direction 2015*
- > *Radiocommunications Spectrum Marketing Plan (1800 MHz Band) 2015*
- > *Radiocommunications (Spectrum Re-allocation—Regional 1800 MHz Band) Declaration 2015*
- > *Telecommunications Act 1997.*

In the Determination, unless the contrary intention appears, a reference to another legislative instrument is a reference to that other legislative instrument as in force from time to time.<sup>1</sup>

## **Detailed Description of the Determination**

Details of the Determination 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.

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<sup>1</sup> Note 1 For references to Commonwealth Acts, see section 10 of the *Acts Interpretation Act 1901*; and see also subsection 13(1) of the *Legislative Instruments Act 2003* for the application of the *Acts Interpretation Act 1901* to legislative instruments.

Note 2 All Commonwealth Acts and legislative instruments are available on the ComLaw website at <http://www.comlaw.gov.au>.

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

This Part deals with preliminary matters for the Determination, such as its purpose and when it will commence. It also sets out fundamental concepts for the allocation, 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 in Part 1 of the Determination.

**Section 1.1                      Name of Determination**

This section names the Determination as the *Radiocommunications (Spectrum Licence Allocation — 1800 MHz Band) Determination 2015*.

**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 the Minister's re-allocation declaration and designation notice for the 1800 MHz band will be allocated. This will be by an ascending bid simultaneous multiple round auction (SMRA) methodology and/or allocation for a pre-determined price. The procedures in the Determination 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, pre-determined price procedures and other matters.

**Section 1.4                      Definitions**

This section defines terms used throughout the Determination. These are supplemented by further definitions in sections 1.5, 2.1, 2.2, 2.3, 3.1 and 4.4 and in clauses 1, 5, 14 and 19 of Schedule 1, and in Schedule 2.

This section also provides that the range of numbers that identifies a frequency range includes the higher, but not the lower number, and that a reference to time in the Determination is a reference to the legal time in the Australian Capital Territory.

**Section 1.5                      Lots**

This section defines terms that relate to the description of units of spectrum (**lots**) that are being offered in the allocation. The marketing plan referred to in this section is the *Radiocommunications Spectrum Marketing Plan (1800 MHz Band) 2015*.

There are 147 lots being offered for allocation by auction or pre-determined price divided into 3 categories:

**Category 1 lots**

This category comprises 144 lots. There are 12 lots in each of 12 geographic areas with a bandwidth of 5 MHz in the 1725 MHz – 1785 MHz frequency range paired with 5 MHz in the 1820 MHz – 1880 MHz frequency range. This category contains all the encumbered parts of the spectrum in the Minister's re-allocation declaration. These are referred to as the "regional lots".

Lots in categories 2 and 3 contain the unencumbered parts of the spectrum in the Minister's designation notice. These are referred to as the "residual lots".

#### Category 2 lots

There are 2 lots in category 2 in the following geographic areas and for the following frequency ranges:

- North Queensland (Cairns/Townsville), 1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz;
- regional South Australia, 1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz.

#### Category 3 lot

There is 1 lot in this category in the following geographic area and for the following frequency range:

- Adelaide, 1770 MHz – 1775 MHz and 1865 MHz – 1870 MHz.

Further details can be found in section 2.4 of the marketing plan.

### **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 the Determination. They are intended to supplement section 4.7 (Lodging application), section 4.12 (Requirements for new application), section 4.15 (Lodging eligibility nomination form) and section 4.16 (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 must be made by the deadline specified in the Determination.

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. 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 3 working days of the deadline and the applicant gives the ACMA evidence that the transfer was made before the deadline. Where full payment is not received within 3 working 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 paid by the due date.

This section also states that 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 the 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, as a result of the allocation of spectrum licences, 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 ACMA may not impose such limits unless the Minister directs it to do so (see subsection 60(9) of the Act).

The Minister in the spectrum licence limits direction has directed the ACMA to impose spectrum licence limits for the allocation of the spectrum declared for re-allocation in the 1800 MHz band (category 1 lots). These limits are set out in the spectrum licence limits direction. These spectrum licence limits do not apply to the spectrum designated for allocation under the designation notice (categories 2 and 3 lots). This means a participant may obtain the use of up to 2 x 25 MHz in the regional 1800 MHz band (spectrum in category 1) and any additional residual spectrum in the 1800 MHz band for North Queensland (Cairns/Townsville), regional South Australia and Adelaide (spectrum in categories 2 and 3).

According to the explanatory statement to the spectrum licence limits direction, the spectrum licence limits that the Minister has directed the ACMA to impose in respect of the spectrum in the regional 1800 MHz band are intended to prevent monopolisation of the spectrum, provide prospective allocation participants with flexibility, enhance competitive tension at auction and reduce the possibility of unsold spectrum following the allocation.

The provisions in this Part give effect to the spectrum licence limits direction by imposing allocation limits to ensure that a person or a specified group of persons does not, as a result of the allocation under the Determination and issue of spectrum licences, have permission to use more than the specified amount of the spectrum in the regional 1800 MHz band.

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 sections 2.2 and 2.3 of 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 sections 4.9 to 4.12 below). This will serve 2 important purposes:

1. It will assist the ACMA to comply with the spectrum licence limits direction, 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 could also provide more potential for collusion (given the connection between 2 or more of the bidding entities).

Although the spectrum licence limits only apply to the regional 1800 MHz band (the spectrum in category 1), the rules around participation of affiliates apply to all participants as the ACMA considered it would be impractical to allow affiliates to participate in the auction but only bid on lots for spectrum in categories 2 and 3.

This Part sets out the allocation limits and explains the circumstances in which an 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.

In this regard, the provisions in Part 4 (sections 4.9 to 4.12) include procedures to identify and resolve any affiliations between applicants prior to the auction commencing. Division 4 of Part 6 prohibits, and sets out procedures for identifying and dealing with, affiliations that occur during the auction. That Division also includes an ongoing reporting requirement for bidders to report any suspected affiliation with another bidder immediately to the ACMA.

In Part 7, sections 7.3, 7.4 and 7.5 deal with situations 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, these provisions set 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 the 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 the Determination, which are:

- 25 MHz of spectrum in the frequency band 1725 MHz – 1785 MHz;
- 25 MHz of spectrum in the frequency band 1820 MHz – 1880 MHz;

in the geographic areas specified in the table in clause 1 of Schedule 1 to the re-allocation declaration.

The ACMA has divided the spectrum into regional lots. This means that applicants will be able to acquire up to 2 x 25 MHz of spectrum in *each* of the 12 geographic regions for these bands. For more information, see the marketing plan, and its associated explanatory statement.

### **Section 2.2      Meaning of *associate***

The Minister has directed the ACMA to apply allocation limits on the amount of spectrum in the regional 1800 MHz band that can be used by a person or specified group of persons as a result of the allocation of spectrum licences under the Determination. Subsection 1.4(1) of the Determination defines 'specified group of persons' as the applicant or bidder and the applicant's or bidder's 'associates'. Section 2.2 then 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. This includes any person that is a party to a 'relevant agreement' with the applicant or bidder as defined under subsection 2.2(2).

According to the explanatory statement for the spectrum licence limits direction, the inclusion of a 'relevant agreement' is designed to cover situations where there may otherwise be no formal associate

relationship existing between 2 persons, but one person (the first person) has agreed that another person 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 2010*, are not included in the meaning of 'relevant agreement' for the purposes of defining an 'associate'. The definition of the term *associate* in the Determination is consistent with the definition employed in the spectrum licence limits direction. More information on the definition can be found in the explanatory statement for the spectrum licence limits direction.

### **Section 2.3      Affiliation between applicants or bidders**

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

This section explains when 2 applicants or bidders will be taken to be affiliated, and that affiliated applicants or bidders will be taken to be a single specified group of persons for the purpose of applying the allocation limits. Under this section, 2 applicants or bidders are affiliated if they are associates of each other or they have an associate in common. An example would be where 2 applicants or bidders have a director in common. This is included in order to comply with subsection 3(3) of the spectrum licence limits direction.

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

This section sets out what matters the ACMA will take into account in considering whether an affiliation exists between 2 or more applicants or bidders. This section does not limit the matters that the ACMA may take into account in determining whether 2 or more applicants or bidders 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, broadly, information relating to the auction and, for an applicant or bidder, includes bidding instructions and 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, or applicants who become bidders, and their 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 or bidder, other than a director or company secretary of the applicant or bidder, 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**). Division 1 of Part IV of the CC Act deals with 'Cartel conduct'. The simplified outline of that Division, 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 the 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 have to 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 2 parties need to ‘make’ or ‘give effect’ to a cartel provision. These 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 confidentiality rules in the Determination are also intended to complement those provisions of the CC Act which deal with price signalling.

If a potential contravention of the confidentiality rules were identified, it will allow the ACMA to consider the use of the powers set out in Part 8 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 the Determination. The definition includes information that could give rise to collusion if disclosed, such as information about a bidding instruction, or about proposed bidding instructions of an applicant or bidder, 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 be capable of affecting another applicant or bidder’s bidding instructions, proposed bidding instructions or bidding strategy or the outcome of the allocation process.

### **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 the 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, it is acknowledged that in order for an applicant to effectively participate in the allocation process (and comply with other requirements) 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 person of the same applicant or bidder, or to an advisor or consultant for the purpose of obtaining advice relating to the allocation process or obtaining finance to purchase spectrum licences in the allocation process. It also includes where an applicant or bidder

discloses confidential information to the ACMA, or as authorised by the 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 obligations**

In order to protect against collusion at all stages of the allocation process, the rules on confidential information apply to each applicant, bidder and related person with knowledge of the applicant's or bidder's confidential information from the date of application until after the allocation process has ended. This section sets out the circumstances that will take place after the relevant allocation process (either auction or for a pre-determined price) that will end the confidentiality obligations 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., the applicant is notified about the applicant's entitlement to be allocated a spectrum licence under subsection 5.4(5), the bidder is notified that the bidder is not a winning bidder, the applicant (who has withdrawn) is notified that the applicant's confidentiality obligation is at an end, or the bidder is asked to make a statement as a winning bidder).

### **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 2 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 5 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 or entitlements under a pre-determined price process are notified.

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 an explicit 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 allocation 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 OR ALLOCATION FOR A PRE-DETERMINED PRICE**

This Part sets out how interested parties can apply to take part in the auction or allocation for a pre-determined price. 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, methods of calculation, and how the ACMA must set lot ratings and starting 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 the Determination.

The auction manager will have a number of specific responsibilities to manage and facilitate the auction. These responsibilities include decisions about setting the number of stages for the auction, the eligibility percentage applied in calculating the activity target during each stage of the auction, the number of waivers, the start time for rounds of the auction, and other auction variables. In some circumstances, the auction manager will exercise these 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.

The ACMA will publicise the appointment of the auction manager, including the name of the person, on the ACMA's website. 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 6.2.

#### **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 the 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 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](http://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 the AIP that will explain the allocation process in greater detail.

The deadlines for lodging the documentation and payments required for an application and eligibility nomination stages of registration to participate in the allocation process 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 applicant information package (AIP) is intended to give prospective participants the key information they need to decide whether to participate in the allocation process. This section specifies the information that the AIP will contain. The AIP will include the Determination and marketing plan, and the Minister's re-allocation declaration, designation notice, and spectrum licence limits direction, that provide the legal basis for the 1800 MHz band allocation.

The AIP will provide information needed for a person to apply to be registered as a bidder, participate in the auction or pre-determined price allocation, and obtain spectrum licences. All forms and documentation required for an applicant to apply and be registered to participate in the allocation will be provided, except for the eligibility nomination form (which will be provided later).

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' (paragraph 4.5(1)(f)).

The ACMA must publish the AIP on its website. A notice will also be published giving details of any changes made to the AIP.

#### **Section 4.6 Lot ratings and starting prices**

This section provides that the ACMA must set:

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

After setting the lot ratings and value of initial eligibility points, 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.

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, value of each initial eligibility point and starting prices for lots set in subsection 4.6(1) in order to calculate the number of initial eligibility points they need to bid on spectrum they wish to acquire. The ACMA will 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 the amounts in subsection 4.6(1) before they nominate their initial eligibility points under section 4.15. Applicants should be aware that the value of each initial eligibility point will not necessarily be equal to the starting 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, or amount to be secured under a deed of financial security, required from applicants under section 4.16, less than the combined starting prices for all lots that they wish to be able to bid on from the first round.

It will not be possible within the auction system for an applicant to place a bid for an amount below the starting price.

As well as providing the basis for applicants to nominate their initial eligibility points, lot ratings will also be used to apply the auction activity rules that will enable each bidder to bid flexibly on its desired package of lots in each auction round. Each registered applicant will be able to bid on any package of lots, where the total lot ratings amount for the package is the same as, or smaller than, their initial eligibility points. Bidders who lose eligibility points for under-activity will, in future rounds, only be able to bid in accordance with their reduced eligibility points. Once lost, eligibility points cannot be recovered. The ACMA's auction system incorporates a facility to give a bidder a running total of its activity during the auction and whether a bidder is meeting its activity target. The system provides a warning notification if a bid instruction does not contain enough activity to meet the bidder's current activity target.

Further information about bidding constraints is set out in relation to Schedule 1 of the Determination below.

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 points, will be used to require applicants to maintain a level of bidding activity (activity target) throughout the auction if they wish to retain maximum flexibility to bid on desired packages of lots. This activity target requirement is designed to promote truthful bidding and price discovery during the auction. It will also deter applicants from waiting until the end of the auction before revealing their true bidding preferences in an attempt to keep prices low (a practice sometimes referred to as '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, a person must first apply to the ACMA to be registered as a bidder. This section sets out the required documents and forms that an applicant must submit, and the application fee that the 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 Acknowledgement completed by the applicant, which specifies that the applicant agrees to be bound by the terms of the Determination;
- > lodge a signed Deed of Confidentiality completed by the applicant;
- > 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 2 deeds will be provided in the AIP.



For any documents lodged by email or fax, original documents must be received by the ACMA within 3 working days after 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 identified in that section.

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 2 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 will include 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 5 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 commencement of the allocation processes under the Determination.

Where the ACMA is satisfied that an affiliation exists between 2 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 the Determination (see explanation of subsection 4.17(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 2 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 of the options available to them under this section. Affiliated applicants are required to notify the ACMA in writing

within 8 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; or
- (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 8 working days of the notification. An affiliated applicant is also taken to have withdrawn if it is one of a remaining group of 2 or more affiliated applicants who have not informed the ACMA of their intention to withdraw.

Where applicants are taken to have withdrawn under this section, the ACMA must notify those applicants and they will not be able to reapply (see subsection 4.17(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. The new applicant must be a body corporate whose only members are one or more of the affiliated applicants. The section 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:

- > 8 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 agrees to a later time) 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 after the deadline (unless the ACMA agrees to a later time).

This timing is intended to give affiliated applicants sufficient time to prepare a new application in accordance with this section, without unduly delaying the commencement of the allocation processes under the Determination.

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 Setting other elements of the auction**

This Division makes provision for the ACMA and the auction manager to set a number of variables relating to the auction process, including the increment of price per lot rating, increment of percentage of high bid, the number of stages for the auction, the eligibility percentage to be applied in calculating the activity target during each stage of the auction and the number of waivers each bidder can utilise during the auction.

#### **Section 4.13 Increments**

This section states that, after the application deadline, the ACMA must set the increments for the auction. These are the increment of price per lot rating and the increment of percentage of high bid. After a starting bid has been made on a lot, new bids on that lot will be subject to a minimum bid. A

person wishing to bid on that lot must make at least the minimum bid in order to make a valid bid in that round. The auction system ensures that a bidder cannot make a bid that is less than the minimum bid.

The minimum bid is calculated by adding an increment to the current high bid. The minimum bid value is updated for every lot and every round where there is a new high bid, based on a formula. The formula for calculating the minimum bid on a lot in the next round is set out in clause 6 of Schedule 1 to the Determination. This formula takes the current high bid and adds the higher of:

- the increment of price per lot rating multiplied by the lot rating for the lot; and
- the increment of percentage of high bid multiplied by that high bid.

During the auction, the auction manager can vary these increments to vary the minimum bid on a lot after fulfilling the consultation requirements set out in clause 8 of Schedule 1 to the Determination.

#### **Section 4.14 Stages of auction, eligibility percentage and waivers**

This section states that after the application deadline, the auction manager must:

- fix the number of stages for the auction; and
- fix a percentage to be applied in calculating the activity target during each stage of the auction (the eligibility percentage); and
- fix the number of waivers for each bidder, being the same number for all bidders; and
- tell all bidders of these matters.

#### **Division 5 Eligibility nomination and financial security**

This Division sets out the rules by which an applicant can lodge an eligibility nomination form and calculate the required eligibility payment or amount under a deed of financial security to secure their initial eligibility points.

#### **Section 4.15 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. Note that 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 lot on offer under the Determination (see section 4.6). 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 points before the auction starts. The initial eligibility points will be nominated by the applicant. Applicants can select any number of eligibility points up to the aggregate number of eligibility points for all lots on offer.

The initial eligibility points nominated by applicants will constrain the total combination of lots that they will be able to bid for and acquire in 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 category, the dollar value of each eligibility point, and the starting price of each lot in the first round.

Instructions on how to lodge documents are given in section 1.6. If an applicant gives its 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 3 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 points by submitting a new eligibility nomination form; however, this must be lodged before the eligibility deadline. If an applicant changes its initial eligibility points, consequential changes to the eligibility payment or amount under the deed of financial security that the applicant has provided under section 4.16 must be made to match the new eligibility payment amount.

#### **Section 4.16 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, or a combination of both, 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 giving the ACMA a deed of financial security for the full amount. Details of the requirements that apply to deeds of financial security given under this section are set out in subsections (4), (5) and (6) of this section.

A situation may arise where the 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 of 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 divided by the dollar value of initial eligibility points, rounded up to the nearest whole point.

A deed of financial security must be executed by:

- (a) an authorised deposit-taking institution within the meaning of the *Banking Act 1959*; or
- (b) a person authorised to carry on business in Australia as an insurer under the *Insurance Act 1973*; or
- (c) a Lloyd's underwriter authorised to carry on insurance business under Part VII of the *Insurance Act 1973*.

If a deed of financial security is executed by a person acting under a power of attorney for a body corporate, the applicant must give the ACMA a copy of the power of attorney with the deed.

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 3 working days after 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 4.16(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 4.16(4).

## **Division 6      Withdrawal**

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

### **Section 4.17      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 at 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.

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 will *not* be refunded.

## **PART 5      ALLOCATION FOR A PRE-DETERMINED PRICE**

This Part outlines the pre-determined price procedures for allocation of spectrum licences without an auction. This Part also sets out what happens if an offer for a spectrum licence at a pre-determined price is not accepted, the pre-determined price allocation process is terminated or full payment is not made for spectrum licences allocated at a pre-determined price.

There may be circumstances of limited demand which could lead to a situation where the ACMA might decide that it is able to identify the highest value user for the spectrum without conducting an auction, and may therefore decide to allocate spectrum licences for lots for a pre-determined price.

### **Section 5.1      Allocation for a pre-determined price without an auction**

This section allows the ACMA, before the auction manager sets the start date and time for the first and second rounds of the auction under section 6.7, to determine that it will offer to allocate spectrum licences for lots for a pre-determined price if it considers that it is able to identify the highest value user of the spectrum without conducting an auction.

Any offer of a spectrum licence made under this Part will be conditional on payment of the pre-determined price.

### **Section 5.2      ACMA must have regard to applicants' requirements**

In deciding whether it may be able to allocate spectrum licences for certain lots without an auction, the ACMA must only have regard to applicants' indications of lot requirements provided through their eligibility nomination forms or through other information about lot requirements provided by applicants to the ACMA.

### **Section 5.3      The pre-determined price**

This section sets out how the pre-determined price is calculated for a spectrum licence. The ACMA will identify each lot to be included in the spectrum licence and will add up the starting prices for each lot (the starting price for each lot is set by the ACMA under section 4.6). The balance of the pre-determined price for a spectrum licence payable by an applicant is the pre-determined price less the amount of any eligibility payment made by the applicant.

### **Section 5.4      Offer of spectrum licence**

This section sets out the procedures that the ACMA will undertake when offering spectrum licences at a pre-determined price. The ACMA will offer each applicant a spectrum licence or licences for the lots identified under paragraph 5.3(1)(a) in the following manner. The ACMA will send each applicant, by registered mail, a draft of the spectrum licence or licences and a notice stating:

- (i) that the applicant is offered a spectrum licence or licences for the relevant lots;
- (ii) the amount of the pre-determined price payable for each spectrum licence and the total of the pre-determined prices;
- (iii) the amount of any eligibility payment made by the applicant and held by the ACMA;
- (iv) the full balance of the pre-determined price payable for the spectrum licence or licences; and
- (v) that the offer is conditional on each other applicant accepting the spectrum licence or licences offered to it.

An applicant who wishes to accept the ACMA's offer must do so by notifying the ACMA in writing within 7 working days of receiving the offer and agreeing, in writing, to pay the full balance of the pre-determined price for all spectrum licences offered.

If every applicant accepts the spectrum licence or licences offered to it, each applicant is entitled to be issued the spectrum licence or licences offered to it on payment of the full balance of the pre-determined price for all spectrum licences. The ACMA will notify each applicant of their entitlement in writing. Payment is to be made in accordance with section 1.7.

#### **Section 5.5 Payment of full balance of pre-determined price**

This section sets out the arrangements where all applicants have accepted the offer of a licence or licences at a pre-determined price. The ACMA must notify the accepting applicants by registered mail of the full balance of the pre-determined price payable for all spectrum licences that the applicant is entitled to. This occurs where the amount is more than the applicant's eligibility payment. This section also sets out the timing and payment arrangements, and states that payment must be made within 10 working days of the date of the notice sent by the ACMA.

#### **Section 5.6 Allocation if some offers refused**

This section sets out the procedures that will apply if an applicant does not accept, in accordance with subsection 5.4(3), a spectrum licence that has been offered to it through the pre-determined price allocation. In this case, the ACMA may:

- (a) withdraw offers for spectrum licences for all lots covered by the licences offered and terminate the pre-determined price allocation process; or
- (b) allocate all those lots by auction or otherwise under the Determination; or
- (c) allocate spectrum licences under subsection 5.4(4) to the applicants who have accepted the offered licences and, for lots covered by licences that were not accepted:
  - (i) allocate those lots by auction or otherwise, in accordance with the Determination; or
  - (ii) withdraw those lots from allocation and allocate the spectrum covered by those lots at a later date.

#### **Section 5.7 Refunds if allocation process terminated**

If the ACMA terminates the allocation process under paragraph 5.6(a), the eligibility payments of all applicants are refundable

#### **Section 5.8 Default**

This section outlines the procedure if an applicant does not pay the full balance of the pre-determined price for a spectrum licence or licences in accordance with subsection 5.5(2). In this case the applicant ceases to be entitled to be allocated the spectrum licence or licences, but the allocation of spectrum licences to other applicants is not affected. The lots included in the spectrum licence or licences that the applicant has not paid the full balance of the pre-determined price for are taken to be

unallocated spectrum under section 8.1 of the Determination. Where this occurs the ACMA may retain any eligibility payment made by the applicant or enforce a deed of financial security given by the applicant, in accordance with section 8.6.

### **Section 5.9 Publication of results**

The ACMA will release the pre-determined price allocation results to the public. This section sets out the information that the ACMA must announce or publish. The information released will include the names of the persons to whom spectrum licences are to be issued, the spectrum allocated to each person, the pre-determined price for each spectrum licence to be issued to that person and the total sum paid by each person (being the total of the pre-determined prices for the spectrum licences to be issued to the person).

## **PART 6 AUCTION PROCEDURES**

This Part describes the structure, procedures and rules of the auction to be held under the Determination.

The ACMA has chosen the SMRA 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 most. This decision took into account the fact that the 1800 MHz band has already been allocated in the major capital cities. The 1800 MHz band can offer signal propagation characteristics complementary to other bands when used to deliver mobile communication services over a wide-scale network including in regional areas.

### **Division 1 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 use of the auction system as a bidder prior to the auction.

#### **Section 6.1 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 6.2 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; and
- > paid the applicable eligibility payment or provided a deed of financial security or a combination of the two, in accordance with the requirements in section 4.16.

An applicant will only become a 'bidder' when its details are entered in the register. The ACMA must not register a bidder until after the eligibility deadline has passed.

This section also explains that the ACMA must, after the eligibility deadline, notify an applicant that it is registered as a bidder. At that time, the ACMA will provide bidders with the contact details for the ACMA, and a copy of the bidder's information recorded in the register for that bidder. 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 6.3 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 6.4 Preparation for bidding**

This section provides that the ACMA will give each applicant an opportunity to try out the auction system prior to the start of the auction. Bidders will also receive a user guide to accessing and using the auction system.

### **Section 6.5 Security of auction**

This section sets out obligations on bidders to ensure that the security of the auction system is maintained. A bidder must keep secure any items used to access the auction system. If such items are lost or stolen, a bidder must immediately notify the ACMA.

## **Division 2 Setting elements of the auction**

### **Section 6.6 Auction procedures**

This section sets out that the auction will consist of a number of stages each of which contains a number of rounds. The first round of the auction starts on the date and time for that round set under subsection 6.7(1). The rounds of the auction will be conducted in accordance with the rules in Schedule 1 to the Determination.

### **Section 6.7 First and second rounds**

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

## **Division 3 Procedures for bidding instructions not using the auction system and for exceptional circumstances**

### **Section 6.8 Auction manager's discretion to accept bidding instructions**

Subsection 6.8(1) recognises that during the auction, unanticipated circumstances may arise that prevent a bidder from being able to use the auction system to submit a bidding instruction for 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 bidding instruction during the bidding period for a round to be submitted by an alternative method. Bidders will receive information about how they can submit a bidding instruction if they are unable to use the auction system once they are registered under section 6.2.

Under subsection 6.8(2), the auction manager also has discretion to permit a bidder to submit a bidding instruction *after the bidding period for a round has ended*, but only if satisfied that technical or communication problems have prevented the bidder from submitting a bidding instruction during the bidding period. Bidding instructions that have been submitted in this way will be regarded as valid bidding instructions made during the bidding period for the round for the purposes of calculating the



results of a round just ended. A bidding instruction cannot be submitted after the results for a round have been provided to bidders.

### **Section 6.9 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, subsection 6.9(1) gives the auction manager permission to take a range of actions to overcome these circumstances. These actions can include making corrections to the results of the current round of the auction and information received by a bidder during the results period for the round, stopping the current round of the auction and 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 round, or stopping the auction.

Subsection 6.9(2) also sets out examples of exceptional circumstances that could permit the auction manager to take discretionary action under this provision, including significant technical difficulty with the auction system. However, the examples given are not exhaustive and do not preclude other circumstances from being regarded as exceptional.

### **Division 4 Affiliations during the auction**

This Division states 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 6.10 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 subsection 1.4(1)). If the ACMA is satisfied that a breach of this provision has occurred, the ACMA may take action under the provisions in section 8.6.

#### **Section 6.11 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 giving details of the affiliation.

#### **Section 6.12 Auction continues despite possible affiliation**

This section states what happens if the ACMA becomes aware during the auction period that 2 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 7.5.

#### **Section 6.13 ACMA consideration of affiliation**

This section explains what steps the ACMA will take if it becomes aware that 2 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.

If bidders are affiliated, the ACMA may then proceed to make a decision under section 8.6 of the Determination.

If the ACMA does not consider that these bidders were affiliated during the auction period after the bidders gave the ACMA information under section 6.11, then the ACMA must notify the bidders of that view.

## **PART 7 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 procedures before 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 7.1 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 have ended. The ACMA must refund any eligibility payment made by an unsuccessful bidder, less any withdrawal penalties, within a maximum period of 6 months after notifying the bidder that they are unsuccessful, except where the ACMA has decided to retain the eligibility payment under section 8.6 due to a breach of the Determination.

#### **Section 7.2 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. A note to this section records that withdrawn applicants who have made eligibility payments will have these payments refunded.

#### **Section 7.3 Winning bidder to make statement about affiliations**

The ACMA is required to notify each winning bidder of 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 not less than 8 working days after the date of request. Notes to the section also highlight the importance of winning bidders submitting a truthful statement. In particular they note that giving false or misleading information to the ACMA may constitute a serious offence under the *Criminal Code*.

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

#### **Section 7.4 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 7.5 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 2 or more winning bidders whose affiliation first occurred after the end of the auction period. It does not apply to affiliations occurring during the auction period (which are covered by Division 4 of Part 6 of the Determination).

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 to the specified allocation 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 5 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 under section 8.1. The winning bidders must pay the balance of the winning price for all the lots 'won', even though the bidders 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 spectrum licences**

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

### **Section 7.6 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 highest final bids made by the winning bidder and the total of any bid withdrawal penalties imposed on the bidder and then deduct the eligibility payment that the bidder has paid. The result of this calculation will be the balance of the winning price payable by the bidder.

### **Section 7.7 Sufficient eligibility payment—issue of spectrum licence without further payment**

This section outlines refunds and the entitlement to be issued spectrum licences where the balance of the winning price as worked out under section 7.6 is less than zero.

If the balance of the winning price is less than zero, the ACMA must refund that part of the eligibility payment that is in excess of the total of the highest final bids for lots won by the bidder at auction plus the total of the bid withdrawal penalties that bidders have incurred. The bidder is entitled to be issued a spectrum licence for each part of the spectrum allocated to the bidder without further payment.

If the balance of the winning price for any winning bidder is equal to zero, the bidder is also entitled to be issued a spectrum licence for each part of the spectrum allocated to the bidder without further payment.

### **Section 7.8 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 greater than zero (i.e. more than the bidder's eligibility payment, if one was made). It also sets out the timing by which the balance of the winning price must be paid.

If the balance of the winning price that has been calculated under section 7.6 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 after the date of the original notice, the balance owing will be due no later than 30 working days after the date of the original notice. If the revised notice is provided *after* 20 working days after the date of the original notice, the due date for payment will be no later than 10 working days after the date of the revised notice.

#### **Section 7.9 Issue of spectrum licence after payment of balance of winning price**

This section provides that a winning bidder is entitled to be issued a spectrum licence for the spectrum allocated to it as a result of the auction process if the balance of the winning price has been paid by the winning bidder according to the procedure set out in section 7.8.

#### **Section 7.10 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 allocated to each winning bidder, the highest final bid for each lot by each winning bidder, the bid withdrawal penalties for each lot imposed on each winning bidder, and the total final sum paid or to be paid by each winning bidder.

### **PART 8 MISCELLANEOUS**

This Part describes various miscellaneous matters that apply to the allocation by auction or pre-determined price process, including the treatment of unallocated spectrum, enforcement procedures, and a right for the ACCC to request certain information about the allocation process.

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 8.1 Unallocated spectrum**

There may be circumstances in which spectrum lots offered at auction are not allocated. For example, unallocated lots could arise where a winning bidder does not pay the balance of the winning price in accordance with section 7.8, or where the ACMA is satisfied that 2 or more winning bidders are affiliated and the spectrum won at auction by the affiliated winning bidders exceeds the allocation limits.

This section provides that any parts of the spectrum that are offered at the auction or for a pre-determined price 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 explains that the ACMA is able to make determinations regarding allocation procedures under section 60 of the Act.

#### **Section 8.2 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 6.2, 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, disrupt or damage the auction system, or use it to breach a law of the Commonwealth.

#### **Section 8.3 ACMA may obtain information from applicants and bidders**

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

This section sets out that the ACMA may require an applicant or a bidder to provide information or documents by giving an applicant or bidder a written notice.

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 or narrowing 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 8.3 is breached, including failure to provide available information or documentation when requested, the ACMA may take action under section 8.6 of the Determination. Section 8.6 permits the ACMA to retain an eligibility payment or enforce a deed of financial security.

#### **Section 8.4 Use of information and documents by ACMA**

Under this section, the ACMA may use any information or documents it obtains in the performance of the ACMA's functions under the Determination. This can be for the purposes of the Determination, and the ACMA's use of such information or documents extends to disclosure and/or publication in the manner stated in the Determination. The ACMA may also use the information or documents to perform its functions in relation to a spectrum licence issued as a result of the allocation process under the Determination. 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 8.5 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 to participate in or during the allocation 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 Parts 5 and 7.

#### **Section 8.6 Retention of eligibility payment or enforcement of deed for breach of procedures**

This section sets out the action that the ACMA may take for a breach of provisions of the Determination, such as the auction rules or related procedures. 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 allocation process.

The ACMA may also take action where:

- > an applicant fails to pay the full balance of the pre-determined price for all spectrum licences as required by subsection 5.5(2);
- > the ACMA is satisfied a bidder breached section 6.10 of the Determination, which prohibits affiliations during the auction period;
- > a winning bidder fails to give a statement about affiliates under section 7.3;
- > a winning bidder fails to pay the balance of the winning price required under section 7.8;
- > a bidder fails to pay the amount of all bid withdrawal penalties as required under clause 18 in Schedule 1;

- > the ACMA is satisfied that there has been a breach of the confidentiality obligations under section 3.2 by an applicant or a bidder (or related persons) after the end of the auction period, but while the confidentiality obligations remain in force;
- > an applicant or a bidder fails to comply with a requirement in a notice given under subsection 8.3(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 4.16. If the ACMA decides to take action under this section, it must notify the applicant or bidder of this decision in writing before the later of: (a) 6 months after the end of the auction period or notification of entitlements for spectrum licences for a pre-determined price; and (b) 6 months after the day on which the breach or failure occurred. The ACMA must provide information about the nature of the breach or failure.

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 8.9.

#### **Section 8.7 Effect of retention on allocation to applicants for pre-determined price**

This section provides that if the ACMA makes a decision under subsection 8.6(1) to retain an eligibility payment or enforce a deed of financial security provided by an applicant then, despite the applicant having accepted an offer of spectrum licences for a pre-determined price and being notified of its entitlements to spectrum licences, the ACMA must not issue a spectrum licence to the applicant, and the spectrum will be taken to be unallocated.

#### **Section 8.8 Effect of retention on winning bidders**

This section provides that if the ACMA makes a decision under subsection 8.6(1) to retain an eligibility payment or enforce a deed of financial security provided by a winning bidder then, despite the applicant having paid the winning price in full, the ACMA must not issue a spectrum licence to the bidder, and the spectrum won by the bidder will be taken to be unallocated.

#### **Section 8.9 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 decision under subsection 8.6(2) to retain an eligibility payment or enforce a deed of financial security, the applicant or bidder 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 8.9 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 8.6(2) may apply to the Federal Court within 1 year of receiving the notice.

Section 8.9 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 8.10 Liability of ACMA**

This section provides that none of the ACMA, the auction manager nor the Commonwealth, is liable to pay damages or costs arising from any act or omission of any person in relation to the allocation procedures set out in the Determination.

#### **Section 8.11 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 8.12 Auction manager may delegate functions and powers**

This section provides that the auction manager may delegate any of his or her 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 any related procedures that are referred to in Part 6 of the Determination.

The Schedule is comprised of 3 Parts which deal separately with the rules applicable to:

- Auction arrangements (Part 1);
- Bidding in the auction (Part 2);
- Bringing the auction to a close (Part 3).

### **Part 1 Auction arrangements**

Part 1 of Schedule 1 describes in detail the rules that will apply during the rounds and stages in the auction.

#### **Clause 1 Rounds of the auction**

Clause 1 sets out that each round is made up of a bidding period and results period. The bidding period is when bidders make their bidding instructions and the results period is when the auction manager, using the auction system, works out the high bids for the round on each lot offered and then provides the results to bidders using the auction system. A bid is taken to have been made when the bidder's bid for a round of the auction has passed data validation checks that are performed by the auction system (see subclause 10(3)).

The results for a round, which will be provided to all bidders, will contain: the amount of the high bid on each lot at the end of the round; an indicator that signals if the bidder with the high bid on a lot for the round is the same bidder with the high bid on that lot from the previous round; the number of bids made on a lot for the round, the minimum bid on each lot for the next round, a list of specified bids that may be made on each lot for the next round; and any other information necessary for the smooth running of the auction.

The specified bids that may be made on a lot for the next round will be the minimum bid and increments of the minimum bid for the lot. These specified bids are known as 'jump bids'. Only specified bids may be made for the round.

During the results period for a round, the bidder will receive, through the auction system, information relevant to that bidder, being the bidding instructions made by the bidder during the bidding period for the round; the amount of any high bid held on a lot by the bidder at the end of the round; the total amount of high bids held by the bidder at the end of the round; the bid withdrawal penalty for each lot that the bidder is liable for under clause 18 for the round; the bidder's eligibility points at the beginning of the next round, the number of bidder's waivers remaining at the beginning of the next round, and any other details necessary for the smooth running of the auction. Other details can include the total withdrawal penalties on all lots for the round and the accumulated withdrawal penalties up to that round for that bidder. Providing this information assists bidders to make decisions on any bidding instructions they wish to give in the following round(s).



## **Clause 2      Schedule for rounds of the auction**

This clause states that rounds must only occur on a working day (as defined in subsection 1.4(1) of the Determination) and will start and finish between 9 am and 5 pm based on the time in the Australian Capital Territory. It also states that there is no minimum or maximum duration for each round (either for the bidding period or the results period), or the interval between rounds. The auction manager will have the discretion to schedule rounds according to this clause. This clause does not limit the number of rounds that can be held on any day.

All bidders will be notified via the auction system of the anticipated schedule of rounds for a given day a minimum of 1 hour before the first round of the day in accordance with subclause 2(5). Subclause 2(5) also allows the auction manager to alter the daily schedule of rounds. However, if this occurs, the auction manager must inform bidders as soon as 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 bidding and results periods.

## **Clause 3      Recess days**

This clause states that the auction manager may declare a day to be a recess day (whether or not the day is a working day). Before the auction manager declares a recess day, he or she must give bidders an opportunity to comment on the proposed declaration and take into account any comments received. If the auction manager declares a recess day he or she must inform all bidders of this decision.

## **Clause 4      Movement to next stage of the auction**

This clause states that the auction manager may move the auction to the next stage.

To ensure efficient running of the auction, bidders will have to be active on lots with a total of lot ratings that meets the relevant activity target set by the auction manager for the stage in which they are bidding. When the number of new bids at one level of activity declines, the auction manager may decide to move to the next stage of the auction with a higher activity level. Before the auction manager decides to move the auction to the next stage, the auction manager must tell bidders of the proposal, give the bidders an opportunity to comment on the proposal, and take into account any comments received. If a decision is taken to move to the next stage, the auction manager must inform all bidders of this decision.

## **Part 2      Bidding in the auction**

### **Clause 5      Definitions**

This clause defines the *activity target* and when a bidder is *active* on a lot.

The definition of activity target for a bidder, during a round in a stage, means the figure (rounded down to an integer) obtained by multiplying the amount of the bidder's eligibility points for that round by the eligibility percentage fixed by the auction manager for that stage.

A bidder is *active* on a lot in a round if, for a round to which the starting price applies, the bidder makes a bid that equals or exceeds the starting price. For any other round, the bidder is *active* if the bidder makes a bid that equals or exceeds the minimum bid on the lot worked out in accordance with clause 6 or the bidder holds the standing high bid on the lot from the previous round and does not withdraw that high bid in the current round.

### **Clause 6      Starting price and minimum bid**

This clause sets out the requirements for a starting price and the minimum bid on a lot.

A bid below the starting price on a lot will not be accepted. Similarly, after a bid has been made for at least the starting price or above on a lot in a round, in any subsequent round a bid below the minimum bid for that lot will not be accepted.

The minimum bid for a lot is the sum of the high bid on that lot from the previous round, as published in the results and information for the round, and the higher of:

- the increment of price per lot rating set under section 4.13, multiplied by the lot rating for the lot; and
- the increment of percentage of high bid set under section 4.13, multiplied by that high bid;

rounded up to the next thousand.

If a bid on a lot is withdrawn, the minimum bid on that lot is worked out in accordance with clause 16.

A bidder who holds the high bid on a lot from a previous round is not required by subclause 6(2) to raise its own high bid, but may do so.

#### **Clause 7 Changing starting prices**

This clause sets out that despite clause 6, the Chair of the ACMA may, at any time, vary the amount of the starting price on a lot. The Chair may do this in order to move the spectrum to its highest valued use.

Before varying starting prices, the Chair must tell bidders of the proposed change, ask bidders for their comments on the proposal within the time (being not less than 1 day) set by the auction manager and take into account any comments received on the proposal. The auction manager must notify all bidders of the change before the round when the change takes effect.

#### **Clause 8 Changing minimum bids**

This clause sets out that despite clause 6, the auction manager may, at any time during the auction, change the amounts fixed under paragraphs 4.13(a) and (b) of the Determination to vary the minimum bid on a lot. During the auction, the auction manager may vary these amounts after consulting with bidders. Adjusting the level of these minimum bid increments may be used to influence the speed at which the auction progresses.

Before doing this, the auction manager must tell bidders of the proposed change, ask bidders for their comments on the proposal within the time (being not less than 1 hour) set by the auction manager, and take into account any comments received on the proposal. The auction manager must notify all bidders of the change before the round when the change takes effect.

#### **Clause 9 All lots on offer simultaneously**

Clause 9 provides that all of the lots on offer at the auction will be open for bidding in each round of the auction. This is a characteristic of a SMRA methodology.

#### **Clause 10 General rules about bidding and bidding instructions**

This clause outlines general rules about bidding including allowable bids, tied bids and validation of bids.

Subject to clauses 11, 12 and 13, a bidder may bid on any combination of lots. A bidder is not restricted to bidding only on the lots that relate to the areas the bidder nominated in its eligibility nomination form. This means a bidder, within the auction, is not bound by their nominated pre-auction strategy. This is a feature of the SMRA methodology in this auction that allows bidders to change bidding strategies at any time.

A bid is taken to have been made when the bidder's bid for a round of the auction has passed data validation checks that are performed by the auction system.

If 2 or more bidders make identical bids on the same lot and the bids are the high bids for the round, the bid selected by pseudorandom selection will be taken to be the high bid on that lot for the round.

A bidder may change, delete or replace a bidding instruction in the auction system as often as desired during the bidding period of a round. The bidding instruction that will be treated as binding for a bidder is the bidding instruction in the auction system at the end time of the bidding period of a round.

#### **Clause 11      Validity of bids**

This clause outlines the 4 requirements for a bid to be valid.

A bid in a round is valid if: it is from a list of specified bids that may be made on a lot for the round referred to in paragraph (e) of the definition of results in subclause 1(2); it is received between the start time and end time of the bidding period for the round (subject to subsection 6.8(2) of the Determination); the size of lots bid for in category 1 of table 1 of Schedule 1 to the marketing plan does not exceed the allocation limits; and the total of the lot ratings of the lots on which the bidder is active does not exceed the bidder's eligibility points for the round.

#### **Clause 12      Eligibility points bidding cap**

This clause outlines how the ACMA's will process bidder's bids so that the bidder's eligibility points are not exceeded.

For the first round, the eligibility points of a bidder will be the initial eligibility points recorded on the register for the bidder under paragraph 6.1(2)(f) of the Determination. For any other round, the bidder's eligibility points will be the lesser of:

- (a) the bidder's eligibility points in the previous round; and
- (b) the points worked in accordance with clause 14.

A bidder is not entitled to bid in such a way that the total of the lot ratings of the lots on which the bidder is active in any 1 round exceeds the bidder's eligibility points at the time of the bid. Subclause 5(2) outlines when a bidder is active in a round.

To ensure that a bidder's eligibility points are not exceeded, the ACMA must process the bidder's bids in order of lot number starting from the lowest number. Then the bids will be processed so that the total of the lot ratings for those bids does not exceed the bidder's eligibility points. If the lot rating for a bid to be processed would result in the progressive total of lot ratings exceeding the bidder's eligibility points, the ACMA will not process that bid or any further bids of the bidder and will treat the bid and those further bids as if they had not been made.

#### **Clause 13      Bidding activity targets**

This clause outlines how a bidder must bid in order to maintain the bidder's eligibility points.

A bidder must bid in such a way during a round that the total of the lot ratings on the lots on which the bidder is active in that round is equal to or greater than the bidder's activity target for the round.

The definition of 'activity target' is given in subclause 5(2). A bidder who does not bid in the way mentioned may lose eligibility points, in accordance with clause 14.

A bidder may exercise a waiver under clause 15 if deciding not to bid in a round, but each bidder will be given the same limited number of waivers that they may exercise.

#### **Clause 14      Loss of eligibility points**

Bidders not meeting the activity requirements will have their eligibility points for a round reduced unless they exercise a waiver or a waiver is exercised on their behalf by the auction manager.

That is, if the bidder does not meet its activity target in the current round; and

- (i) the bidder does not exercise a waiver in the current round; or
- (ii) the bidder tells the auction manager that a waiver under subclause 15(5) is not to be exercised;

then the bidder's eligibility points for the next round will be reduced.

The formula for the amount of a bidder's eligibility points, rounded up to an integer, for the next round is:

$$E = \frac{R}{P}$$

where:

**E** is the bidder's eligibility points for the next round; and

**R** is the sum of the lot ratings of the lots on which the bidder was active in the current round; and

**P** is the eligibility percentage that applied in the current round.

Bidders who lose eligibility points for under-activity will, in future rounds, only be able to bid in accordance with their reduced eligibility points. Once lost, eligibility points cannot be recovered. The ACMA's auction system incorporates a facility to give bidders a running total of their activity during each round of the auction. The system provides a warning notification if a bidder does not make sufficient bids to meet the bidder's current activity target.

#### **Clause 15      Waiver**

This clause outlines the use of a waiver during a round of the auction. A waiver to bid can be exercised to avoid losing eligibility points.

A waiver is designed for times when bidders need to take 'time out' from the auction, perhaps to consider an alternative bidding strategy. All bidders, therefore, will have the same number of waivers which they can exercise to exempt them from the reduction of their eligibility points. The number of waivers is set by the auction manager after applications close, and registered applicants will be advised of the number of waivers available.

Bidders can either:

- nominate to exercise a waiver in a round (a 'pro-active waiver'); or
- allow the auction manager to automatically apply one of their waivers (an 'automatic waiver').

Rather than reduce eligibility, an 'automatic waiver' will occur unless the applicant asks the auction manager not to do so (this is an 'automatic waiver override').

A bidder, who uses a waiver in a round either through a pro-active waiver or an automatic waiver, does not lose eligibility points in that round.

A bidder may continue to exercise waivers until the bidder has used all its waivers fixed by the auction manager under paragraph 4.14(c) of the Determination.

A difference between a pro-active waiver and an automatic waiver is that a bidder can use a pro-active waiver to keep the auction open for one more round if no new bids have been made. Note a bidder can only use a pro-active waiver where the bidder has not placed a bid and has not withdrawn a bid in a round.

A round will not be regarded as being within the final 2 consecutive rounds under subclause 19(1) if:

- (a) there are no bids in the round (and, as a result, the round would, but for subclause 15(6), be regarded as being within the final 2 consecutive rounds); and
- (b) a bidder exercises a waiver in the round.

#### **Clause 16      Withdrawal of bids**

This clause sets out how a bidder may withdraw a bid during a round of the auction.

The SMRA format allows bidders to change their bidding strategies and the lots they hope to win. To do this a bidder may need to withdraw its high bids on some lots. Therefore, during a round, a bidder may withdraw its bid on a lot from a previous round but only if the bid is the high bid on the lot in that round.

When a high bid is withdrawn, and if no other bidders bid on the lot during the round, the lot will be shown in the next results period as having the next highest bid that was bid by another bidder during the auction (whether the next highest bid was published in the results as a high bid or not). The bid will not be attributed to any registered bidder. Rather, it will be attributed to the ACMA. The ACMA will not apply a minimum bid increment to the amount for that lot in the next round. Instead, the minimum bid on the lot will be set equal to the previous second highest bid made by another bidder. If no other bid has been made on the lot in previous rounds, the minimum bid will be the initial starting price amount.

The bidder who has previously withdrawn a bid on a certain lot may bid on that lot in a later round.

The bidder withdrawing the bid may lose eligibility points, as set out in clause 17. If a bidder withdraws a high bid, the eligibility points of the bidder will be adjusted in accordance with the formula in clause 14. The bidder will need to consider whether, by withdrawing a bid on a lot, it fails to meet the activity target for that round. The withdrawing bidder may also be liable for a withdrawal penalty (see clause 18).

Each bidder is limited to making withdrawals for no more than 4 rounds as outlined in subclause 16(3).

#### **Clause 17      Loss of eligibility points on withdrawal**

If a bidder withdraws a bid in a round, the bidder will not be regarded as being active on that lot and may lose eligibility points as outlined in clause 14.

#### **Clause 18      Withdrawal penalty**

As outlined in clause 16, a bidder may withdraw a bid from a lot. However to discourage bidders making frivolous bids and then withdrawing them, each bid withdrawal is subject to a bid withdrawal penalty as follows.

A bidder who withdraws a bid will be liable to the ACMA for the difference between the withdrawn bid and, if there is a subsequent bid on the lot which is not equal to or greater than the withdrawn bid, the highest subsequent bid on that lot (the 'shortfall penalty').

If a bidder withdraws a bid on a particular lot and there is no subsequent bid on it, the penalty is 10% of the amount of the withdrawn bid.

A bidder may withdraw a bid on a particular lot more than once, but the bidder is liable for a withdrawal penalty each time.

The amount of all withdrawal penalties imposed on an unsuccessful bidder will be deducted from the bidder's eligibility payment before any remaining portion of the eligibility payment is refunded. The ACMA may also enforce a deed of financial security given by a bidder, if the bidder fails to pay the amount of all bid withdrawal penalties (paragraph 8.6(1)(f) of the Determination).

If a withdrawal penalty is incurred by a winning bidder, the amount of the penalty will be added to the balance of the winning price payable by the winning bidder.

### **Part 3 Bringing the auction to a close**

#### **Clause 19 Closing of the auction**

The auction will be closed when rounds are in the final stage and in 2 consecutive rounds there are both no new bids being made and no 'pro-active waivers' being exercised (as described in clause 15). The exercise of an 'automatic waiver' by the auction manager under subclause 15(5) does not constitute the exercise of a waiver by the bidder for the purpose of clause 19.

If bidding is continuing after 20 rounds, it is also possible for the auction manager, following consultation with bidders (as set out in clause 19(5)), to bring the auction to a close on a round he or she specifies.

The auction manager will tell bidders when the auction is closed, also referred to as the conclusion of the auction.

At the close of the auction, the bidder who is the highest bidder on a lot is taken to hold the highest final bid on the lot and to be the winning bidder for that lot.

### **SCHEDULE 2 PARTS OF THE SPECTRUM**

The '1800 MHz band' is defined in subsection 1.4(1) of the Determination by reference to Schedule 2. This Schedule sets out that the parts of the spectrum in the 1800 MHz Band for the purpose of this allocation are the following:

- (a) the frequency ranges 1725 MHz – 1785 MHz and 1820 MHz – 1880 MHz in the geographic areas specified in the table in clause 1 of Schedule 1 to the re-allocation declaration (i.e. the spectrum covered by the category 1 lots as outlined in the marketing plan);
- (b) the frequency ranges in the identified geographic areas of Australia, as that term is defined in section 3 of the designation notice and specified in the Schedule to the designation notice, being 1770 MHz – 1775 MHz and 1865 MHz to 1870 MHz in Adelaide and 1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz in each of regional South Australia and Cairns/Townsville (i.e. spectrum covered by the category 2 and category 3 lots outlined in the marketing plan).

### **SCHEDULE 3 ALLOCATION LIMITS**

Allocation limits are defined in section 2.1 of the Determination by reference to Schedule 3. This Schedule sets out that the allocation limits are 25 MHz of spectrum in the geographic areas specified in the table in clause 1 of Schedule 1 to the re-allocation declaration in each of the frequency ranges 1725 MHz – 1785 MHz and 1820 MHz – 1880 MHz. This is consistent with the Minister's spectrum licence limits direction.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### Radiocommunications (Spectrum Licence Allocation – 1800 MHz Band) Determination 2015

The parts of this legislative instrument that are subject to section 42 (disallowance) of the *Legislative Instruments Act 2003* (LIA) 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 29 January 2014, the Minister for Communications made the *Radiocommunications (Spectrum Designation) Notice No. 1 of 2014* (the designation notice) under subsection 36(1) of the *Radiocommunications Act 1992* (the Act), designating the spectrum within the following frequency ranges and geographic areas as spectrum to be allocated by issuing spectrum licences:

1770 MHz – 1775 MHz and 1865 MHz – 1870 MHz in Adelaide;

1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz in regional South Australia; and

1710 MHz – 1712.5 MHz and 1805 MHz – 1807.5 MHz in Cairns/Townsville.

On 26 May 2015, the Minister made the *Radiocommunications (Spectrum Re-allocation—Regional 1800 MHz Band) Declaration 2015* (the re-allocation declaration) under subsection 153B(1) of the Act. The re-allocation declaration makes the parts of the spectrum from 1725 MHz to 1785 MHz and 1820 MHz to 1880 MHz in specified areas of regional Australia, 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 licences 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 licences as a result of the auction or allocation for a pre-determined price 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 LIA 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 LIA. This is because:

- (a) item 35 in subsection 44(2) of the LIA 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 LIA.

This statement of compatibility has been prepared only with respect to those parts of the legislative instrument to which section 42 (disallowance) of the LIA 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 LIA 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 LIA are compatible with human rights as they do not raise any human rights issues.