

Explanatory Statement

Radiocommunications Act 1992 ***Australian Communications and Media Authority Act 2005***

Radiocommunications (Spectrum Licence Allocation—Residual 700 MHz Spectrum) Direction 2016

Issued by the Authority of the Minister for Communications

Purpose

The purpose of this instrument is to direct the Australian Communications and Media Authority (ACMA) with regard to the allocation and issue of spectrum licence(s) in the parts of 700 MHz band that remain unallocated following the 2013 Digital Dividend auction (residual 700 MHz spectrum).

In allocating the residual 700 MHz spectrum, this instrument directs the ACMA in respect of the primary process:

- to conduct an auction to allocate licences for the residual 700 MHz spectrum in two products (one 2 x 10 MHz lot, and one 2 x 5 MHz lot) that will expire concurrently with licences issued after the 2013 Digital Dividend auction; and
- to set allocation limits so that no person or specified group of persons may use more than 2 x 20 MHz in the entirety of the 700 MHz band, including current holdings; and
- to set a reserve price or pre-determined price of \$1.25/MHz/pop for each spectrum licence allocated in accordance with this instrument; and
- to permit successful bidders to pay spectrum access charges in instalments, so long as they meet the conditions set out in the direction.

This instrument also contains a direction to the ACMA to conduct a secondary allocation process in the case of unsold lot(s) of spectrum remaining in the 700 MHz band at the conclusion of the primary allocation process. Under that secondary allocation process, the ACMA must first publish an offer to conduct a tender for the unsold spectrum with 30 days of the secondary allocation process commencing. The ACMA's offer to run a tender must remain open for a period of 6 months but terminates earlier if a valid expression of interest is received. If one or more expressions of interest are received, the ACMA must run a tender.

If no expressions of interest are received within 6 months, the ACMA must make the licence available for purchase for a pre-determined price which is the reserve price adjusted, if necessary, to reflect the shorter licence period. The licence period for a licence issued under the secondary allocation process must expire on or before the expiry of the licences allocated following the 2013 Digital Dividend auction. The direction to conduct the secondary process will only commence if triggered by the Minister.

Authority

The *Radiocommunications (Spectrum Licence Allocation—Residual 700 MHz Spectrum) Direction 2016* (direction) contains a series of directions made by the Minister for Communications under:

- subsection 14(1) of the *Australian Communications and Media Authority Act 2005* (ACMA Act), which enables the Minister to direct the ACMA in the performance of

its functions or the exercise of its powers, including in relation to the allocation and issue of spectrum licences, and powers to make or amend a marketing plan under section 39A of the *Radiocommunications Act 1992* (Radcomms Act) and allocation procedures under section 60 of that Act; and

- subsection 60(10) of the Radcomms Act, which enables the Minister to direct the ACMA in relation to the exercise of the ACMA's power to determine procedures imposing limits on the allocation of spectrum licences; and
- subsection 294(2) of the Radcomms Act, which enables the Minister to direct the ACMA about the matters dealt with in determinations that fix spectrum access charges payable by licensees for issuing spectrum licences and the times when those charges are payable.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. However, the instrument is not subject to disallowance or sunseting, as it is a direction by a Minister to a person or body (see item 2 of section 9 and item 3 of section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* respectively).

Background

700 MHz spectrum is highly valued for 4G LTE mobile broadband services due to its technical propagation characteristics and the benefits associated with international harmonisation. 700 MHz spectrum in Australia is allocated for use under nationwide spectrum licences (excluding the Radio Quiet Zone in Western Australia), and forms a key element of the mobile operators' national networks.

In 2013, the ACMA held the 'digital dividend' spectrum auction to re-allocate 2 x 45 MHz of the spectrum in the 700 MHz band in 9 lots. This spectrum had been vacated by analogue television transmission services.

Only two carriers, Telstra and Optus, participated in the auction with the following results:

- Telstra purchased 2 x 20 MHz of 700 MHz spectrum; and
- Optus purchased 2 x 10 MHz of 700 MHz spectrum.

Following the digital dividend auction, 3 lots, i.e. a total of 2 x 15 MHz, of 700 MHz spectrum remained unsold. The ACMA's allocation procedures for the digital dividend auction provided that any unallocated 700 MHz spectrum lots might later be offered for allocation by a procedure, and at a time, to be determined by the Australian Communications and Media Authority (ACMA).

In March 2016 the Government received an unsolicited proposal from Vodafone Hutchison Australia (VHA) for the acquisition of 2 x 10 MHz of the unsold 700 MHz spectrum. VHA proposed to acquire this spectrum for a licence term of 11 years and 9 months, for \$594.3 million, payable in three instalments over three years.

Allocation by auction

In May 2016 the Department publicly consulted on a draft Ministerial direction to give effect to VHA's proposal. Submissions to that consultation process demonstrated strong market interest in the spectrum. After considering the submissions received and all other issues involved, the Government determined that the competing interests would best be resolved through a competitive process.

On 7 October 2016 the Minister for Communications and the Arts announced the Government's decision to move to an auction of all 2 x 15 MHz of the unsold 700 MHz spectrum. Consistent with this decision, the revised direction requires the ACMA to allocate the residual 700 MHz spectrum by auction.

Allocation limits

Allocation limits are an important tool in promoting competitive and efficient outcomes in the mobile market. They help to ensure that no party is able to acquire spectrum for the purpose of preventing its competitors from acquiring spectrum, or to prevent monopolisation of the spectrum and to help ensure that the results of the auction are in the long-term interests of end-users.

Given the high demand for 700 MHz spectrum, the Minister sought advice from the Australian Competition and Consumer Commission (ACCC) on appropriate allocation limits. The ACCC undertook targeted consultation to inform the development of its advice. The ACCC provided its advice to the Minister on 11 November 2016, recommending allocation limits of 2 x 20 MHz. Allocation limits of 2 x 20 MHz are intended to promote the efficient use of the spectrum, prevent monopolisation in the mobile market, and increase competitive tension at auction.

Consistent with this advice, the direction revokes the *Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012* and requires the ACMA to impose allocation limits of 2 x 20 MHz for the auction of the unallocated 700 MHz spectrum (the primary process).

Reserve price

A reserve price is also commonly referred to as a 'starting price' or an initial price; it is the price below which an applicant may not place a bid for the spectrum at the auction.

On 14 December 2012 the former Minister for Broadband, Communications and the Digital Economy directed the ACMA to set as the reserve price for the digital dividend auction, an amount of \$1.36/MHz/pop for lots in the 700 MHz band (*Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No.2 of 2012*).

All 700 MHz spectrum, including sold and unsold lots, is licenced for 15 year terms, expiring on 31 December 2029. As unsold lots carry the same expiry date, their value reduces as the life of the licence shortens. The direction revokes the *Radiocommunications (Spectrum Access Charges – 700 MHz Band) Direction No. 1 of 2013* and requires the ACMA to set a reserve price of no less than \$1.25/MHz/pop, being the digital dividend reserve price adjusted for a shorter licence duration of 11 years and 9 months.

The direction requires the ACMA to use the population ('pop') figure of 22,872,578, being the projected population determined by the ACMA when setting the initial price used for the previous allocation of spectrum licences in the 700 MHz band in 2013, in accordance with the *Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No. 2 of 2012*¹.

¹ Available on the Federal Register of Legislation.

Payment in instalments

The direction requires the ACMA to permit successful bidders to pay their spectrum access charge upfront before commencement of the licence or in instalments, so long as the instalments meet the conditions set out in the direction. If payment is to be by instalments, the direction requires the first instalment payment to be payable at least 2 months before the commencement of the licence.

The direction requires the ACMA to require the spectrum access charge be payable in no more than three annual consecutive instalments. For example:

- a) 1 January 2018;
- b) 1 January 2019; and
- c) 1 January 2020.

The direction requires the present value of the total spectrum access charge to be the same (rounded to the nearest \$1000) as the amount determined in accordance with the allocation procedures, after calculating the present value of each instalment in accordance with subsection 7(5). That is, the sum of the present value of the instalment payments must equal the present value of the total spectrum access charge.

The direction requires the first instalment payment to be calculated as being the same as the amount of that payment, and that any subsequent instalment payment must be calculated as that instalment payment reduced at the rate of 5% per annum for the period from the date that instalment payment is payable to the date the first instalment is payable. For example:

For the following three instalment payments:

- a) first instalment—\$500,000,000 (payable 31 January 2018);
- b) second instalment—\$125,000,000 (payable 31 January 2019);
- c) third instalment—\$125,000,000 (payable 31 January 2020);

the present value of each instalment would be calculated as (when rounded to the nearest \$1,000):

- d) first instalment—\$500,000,000;
- e) second instalment—\$119,048,000;
- f) third instalment—\$113,379,000.

The direction requires the ACMA to make instalment payments available to parties acquiring spectrum in both the primary and secondary allocation processes. Instalment payments provide financial flexibility to successful bidders, without delaying access of the successful bidder to the spectrum licence. Instalment payments also reduce the upfront financial burden on carriers, thus encouraging participation of all interested parties at auction.

Security on instalment payments

The direction requires that, if the ACMA requires a bank guarantee from a prospective licensee in relation to instalment payments of spectrum access charges, the amount secured by the guarantee must be five per cent of the outstanding instalment payments. This means the dollar amount guaranteed will be reduced with the payment of each instalment and the guarantee is only required to be provided for the period during which any spectrum access charges remain owing to the Commonwealth.

A bank guarantee mitigates the risk to the Commonwealth in the case of default. The first instalment payment is approximately 50 per cent of the total amount payable, and represents payment for approximately five years and ten months of the licence term. The amount of five per cent of the balance represents an appropriate level of guarantee for spectrum which, unlike most other assets, cannot be damaged or stolen. It balances the need to manage the Commonwealth's exposure to lost licence fees and administrative costs of revoking and reissuing a licence in the event that the full spectrum access charges were not paid, with the financial burden of a bank guarantee on potential bidders.

Secondary allocation process

In the case of unsold spectrum at the conclusion of the auction, the direction requires the ACMA to make the unsold spectrum available for purchase to any interested party under a two stage process. The direction requires the ACMA to publish an offer to conduct a tender for the unsold spectrum no later than 30 days after the date that sections 9 and 10 commence. The offer must remain open for a period of 6 months but terminates earlier if a valid expression of interest is received.

Where no valid expression of interest is received in response to the ACMA's offer within the 6 month period, the direction requires the ACMA to make the licence available for purchase for a pre-determined price (being the adjusted reserve price), calculated according to subsection 10(12).

Where a valid expression of interest is received, the direction requires the ACMA to run a tender process as soon as practicable, and advertise for tenders for the spectrum, keeping the tender open for a period of 30 days. Where only one valid offer is received through the tender process, the ACMA is required to allocate the spectrum to the party who made the offer. Where more than one valid offer is received through the tender process, the tenders are to be assessed on price only.

The direction requires the ACMA to set the price for the secondary allocation process at \$1.25/MHz/pop adjusted, if necessary, to reflect a shorter licence period. The direction requires the unsold lot to expire on 31 December 2029 (or earlier), and for spectrum licences allocated by way of tender to come into force not later than 18 months after the first valid expression of interest for that spectrum is received by the ACMA.

The direction requires allocation limits for the secondary allocation process be revoked so any interested party can acquire the spectrum, irrespective of their existing holdings in the 700 MHz band. The removal of allocation limits for the secondary allocation process is intended to encourage the allocation of all of the valuable 700 MHz spectrum to an efficient use for the benefit of Australian mobile users.

A direction to the ACMA on a secondary allocation process will provide certainty to industry about the Government's future intentions for any unsold spectrum. It puts in place a procedure to encourage the allocation of this highly valuable spectrum for efficient use, and allows industry to consider any unsold spectrum in upcoming financial and infrastructure planning.

Regulation Impact Statement

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary, as the amendments have a nil or low impact on business or the economy or individuals.

Statement of compatibility with human rights

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

The direction is compatible with human rights as it does not raise any human rights issues.

Consultation

Between 6 May and 10 June 2016 the Department of Communications and the Arts (Department) invited submissions on a draft Ministerial direction to allocate 2 x 10 MHz of spectrum to VHA. The Department received seven submissions. Based on these submissions, the Government decided to not proceed with the Ministerial direction to allocate spectrum to VHA, and decided to allocate all 2 x 15 MHz of the 700 MHz spectrum by auction.

From 21 October to 17 November 2016 the ACMA publicly consulted on draft auction instruments. Nine submissions were received. These submissions will be taken into consideration by the ACMA in developing its final auction instruments, to be published in January 2017.

In October 2016 the ACCC conducted targeted consultation on appropriate competition limits for the unallocated spectrum in the 700 MHz band. These submissions assisted the ACCC in developing its advice to the Minister on competition limits.

Notes on sections

Section 1 – Name of instrument

Section 1 provides that the name of the Direction is the *Radiocommunications (Spectrum Licence Allocation—Residual 700 MHz Spectrum) Direction 2016*.

Section 2 – Commencement

Section 2 provides that, other than sections 9 and 10, the Direction commences on the day after the instrument is registered on the Federal Register of Legislation. Sections 9 and 10 commence on a single day fixed in a notifiable instrument made by the Minister.

Section 3 – Authority

Section 3 provides that the instrument is made under subsection 14(1) of the *Australian Communications and Media Authority Act 2005* and subsections 60(10) and 294(2) of the *Radiocommunications Act 1992* (Radiocommunications Act).

Section 4 – Interpretation

Subsection 4(1) defines terms used in the Direction.

Persons will be ‘associates’ in certain circumstances as specified in the definition, including:

- two bodies corporate with a common director or secretary;
- two bodies corporate with a common shareholder with at least 15% of the issued shares or 15% of the voting power in each body corporate;
- an individual and their spouse or de facto partner;
- an individual and a body corporate related to a body corporate of which the individual is a director or secretary; and
- a person with a relevant agreement with another person:
 - for use of the residual 700 MHz spectrum; or
 - relating to the acquisition of a spectrum licence for the residual 700 MHz spectrum.

The last provision listed above is designed to capture agreements (whether formal or informal) made in relation to the spectrum to be allocated, rather than agreements relating to use of the other parts of the 700 MHz band which may already be in use or other parts of the spectrum. The definition of ‘relevant agreement’ also excludes:

- agreements made under Part XIC of the *Competition and Consumer Act 2010*;
- agreements made between carriers under the *Telecommunications Act 1997*; and
- roaming agreements.

Subsection 4(2) provides that the lower number in a reference to part of the spectrum is not included in that part of the spectrum, while the higher number is included. This is to prevent frequency band overlap.

Subsection 4(3) provides that the expression ‘\$x/MHz/pop’ means a unit amount applied to determine the reserve price or pre-determined price for the allocation of spectrum licences, where:

- \$x = an amount of Australian dollars;
- MHz = the bandwidth of the part of the spectrum to be specified in a spectrum licence in which operation of radiocommunications devices is authorised; and
- pop = 22,872,578.

This was the projected population determined by the ACMA when setting the initial price used for the previous allocation of spectrum licences in the 700 MHz band in 2013, in accordance with the *Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No. 2 of 2012*.

All Acts and instruments referred to in section 4 are available on the Federal Register of Legislation.

Section 5 – Repeal of prior instruments

Section 5 repeals the *Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012* and the *Radiocommunications (Spectrum Access Charges – 700 MHz Band) Direction No. 1 of 2013*.

The *Radiocommunications (Spectrum Licence Limits) Direction No. 1 of 2012* is available on the Federal Register of Legislation.

The *Radiocommunications (Spectrum Access Charges – 700 MHz Band) Direction No. 1 of 2013* is not a legislative instrument and is available (as at 25 November 2016) on the ACMA's website.²

Section 6 – Direction on allocation limits

Section 6 directs the ACMA to determine procedures under subsection 60(10) of the Radiocommunications Act for allocation of residual 700 MHz spectrum to ensure that no person or specified group of persons may be allocated licences for that residual spectrum that would enable them to use more than 2x20 MHz of the spectrum across the entire 700 MHz band.

Section 7 – Direction that spectrum access charges may be payable by instalments

Section 7 directs the ACMA to make a charges determination that permits the payment of spectrum access charges by instalments that meet the following conditions:

- the first payment is payable at least 2 months before the commencement of the licence;
- the present value of the second and any subsequent instalment payment must be reduced at the rate of 5% per annum for the period from the date that instalment payment is payable to the date the first instalment payment is payable; and
- if the licence is allocated under the primary allocation process in section 8:
 - there are no more than 3 instalment payments;
 - the second payment must be paid 12 months after the first payment; and
 - if there is a third payment, it must be paid 12 months after the second payment.

The ACMA may make a charges determination covering matters (or aspects of matters) that are not specified in the Direction, provided that those matters are not inconsistent with the requirements in the Direction.

Section 8 – Direction on the primary allocation process

Section 8 directs the ACMA to enable licences for the residual 700 MHz spectrum to be allocated by way of an auction of two separate products: the 2x10 MHz lot and the 2x5 MHz lot (as specified in the definitions). The auction process must comply with the following requirements:

- the 2x10 MHz lot must be auctioned first;
- the licences must be for the period 1 April 2018 to 31 December 2029; and
- the reserve price must be \$1.25/MHz/pop (rounded to the nearest \$1,000).

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<http://www.acma.gov.au/~media/Legal%20Services/Regulation/pdf/Rcomm%20Spectrum%20Access%20Charges%20%20700%20MHz%20Band%20Direction%20No%201%20of%202013%20pdf.pdf>

However, if the ACMA is able to identify a person willing to make the highest value payment for a product, that spectrum licence may instead be allocated for a pre-determined price.

Subsection 8(9) directs that, if the ACMA requires a bank guarantee to be provided as security where a person has elected to pay spectrum access charges by instalments, the amount secured by the guarantee must be five per cent of the amount of the spectrum access charges owing to the Commonwealth and is only required for the period during which any spectrum access charges remain owing by that person.

This level of security is designed to protect the Commonwealth from losses it would suffer, including the administrative costs of revoking and reissuing licences and lost licence revenue in the time it would take to do so, if the licensee defaults on payments. The five per cent amount balances the risks to the Commonwealth with the fact the financial burden that obtaining bank guarantees may place on bidders.

Section 9 – Repeal of provisions of the instrument

If section 9 commences, the directions in sections 6 (allocation limits) and 8 (primary allocation process) are repealed.

Section 10 – Direction on the secondary allocation process

If section 10 commences, the ACMA is directed to enable licences for any product in the residual 700 MHz spectrum which remain unallocated (secondary product) to be allocated by way of a two-stage process. The first stage is that the ACMA must, within 30 days of the section commencing, advertise seeking expressions of interest from persons interested in acquiring a licence for any secondary product by way of a tender. Following receipt of a valid expression of interest, the ACMA must conduct a tender and issue the licence to the highest value valid tender.

If no valid expression of interest is received within 6 months, the ACMA is directed to enable the allocation of licences for any unallocated secondary product for a predetermined price (being the reserve price) and subject to the same conditions regarding the spectrum licence period.

The licence must:

- commence no later than 18 months after either:
 - the first valid expression of interest is received for the spectrum licence; or
 - the request is received for the allocation of the spectrum licence for a predetermined price; and
- expire no later than 31 December 2029.

The provision for expiry is to ensure consistency with the expiry dates for licences issued within the 700 MHz band.

The reserve price is \$1.25/MHz/pop rounded to the nearest \$1,000 and reduced (as determined by the ACMA) to reflect the shorter licence period.

Subsection 10(13) will replicate the requirements in subsection 8(9) (as described above) in relation to bank guarantees the ACMA may require in relation to payments of spectrum access charges by instalments.