

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016* (**the Determination**) under sections 60 and 294 of the *Radiocommunications Act 1992* (**the Act**).

Under section 60, the ACMA must determine, in writing, the procedures to be applied in allocating spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act, and under section 294, the ACMA may make determinations fixing spectrum access charges payable by licensees for issuing spectrum licences, and specifying the times when those charges are payable.

Purpose and operation of the Determination

The Determination sets out the procedures to be applied in allocating spectrum licences in the frequency ranges of 733 MHz to 748 MHz and 788 MHz to 803 MHz (**the residual 700 MHz band**). These licences will be allocated in a single auction using the Simple Clock Auction (**the SCA**) methodology. If, in particular circumstances, the ACMA considers there is no need for an auction, the Determination allows the ACMA to allocate a licence or licences to an applicant or applicants without conducting an auction.

The Determination also fixes the spectrum access charges payable by the persons to whom such licences are allocated, by reference to the winning bids at the auction (or, if there is no auction, by reference to starting prices set by the ACMA).

Background

Spectrum in the frequency range from 694 MHz to 820 MHz (**the 700 MHz band**) was freed up as television services in Australia moved from analog to digital-only broadcasts. Digital broadcasting technology uses bandwidth far more efficiently than equivalent analog services, and television broadcasting services required much less spectrum after the period of analog and digital television simulcasting ended in 2013. The remaining digital broadcasting channels were ‘restacked’, or re-tuned, to frequencies below channel 52 in the UHF band, leaving a single contiguous block of spectrum (**the digital dividend**) in the 700 MHz band clear for re-allocation.

In June 2010, the then Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, publicly announced that the size of the digital dividend would be 126 MHz, comprising the 700 MHz band. On 9 July 2010, the Minister for Broadband, Communications and the Digital Economy directed the ACMA to act in accordance with the Commonwealth’s communications policy objective that the 700 MHz band be cleared, over time, of broadcasting services (see the *Australian Communications and Media Authority (Realising the Digital Dividend) Direction 2010*).

Although the ACMA has not restricted the 700 MHz band to specific categories of use, spectrum in both it and in the frequency range 2.5 GHz to 2.69 GHz (**the 2.5 GHz band**) was, and is, most likely to be used to deploy or extend mobile telecommunications and broadband using advanced wireless services such as 4G LTE (Long Term Evolution technology). The recent rapid take-up of mobile devices, especially smart phones and tablet computers, has led to an exponential growth in wireless data traffic. This in turn has substantially increased demand for suitable spectrum to support and improve the quality of mobile services.

On 1 November 2011, following recommendations from the ACMA, the Minister for Broadband, Communications and the Digital Economy made declarations that specific parts of the spectrum in both the 700 MHz and 2.5 GHz bands would be subject to re-allocation by spectrum licensing under section 153B of the Act. Two blocks of spectrum in each band were to be re-allocated. In the 700 MHz band, this corresponded to the frequency ranges 703 MHz to 748 MHz and 758 MHz to 803 MHz (see the *Radiocommunications (Spectrum Re-allocation) Declaration No. 1 of 2011 (the Re-allocation Declaration)*).

700 MHz band allocation in 2013

The ACMA undertook a ‘Combinatorial Clock Auction’ in 2013 for the 700 MHz and 2.5 GHz bands, in accordance with the *Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012*. In the 700 MHz band, there were nine 2 x 5 MHz national lots on offer (totalling 2 x 45 MHz). Optus Mobile Pty Ltd (**Optus Mobile**) won two lots (totalling 2 x 10 MHz, for the frequency ranges 703 MHz to 713 MHz and 758 to 768 MHz) and Telstra Corporation Ltd (**Telstra**) won four lots (totalling 2 x 20 MHz, for the frequency ranges 713 MHz to 733 MHz and 768 MHz to 788 MHz). This meant that there were three 2 x 5 MHz lots (totalling 2 x 15 MHz, for the frequency ranges 733 MHz to 738 MHz and 788 MHz to 793 MHz) which were left unsold.

Residual 700 MHz band scheduled for allocation in 2017

The Minister for Communications and the Arts, Senator Mitch Fifield, (**the Minister**) has directed the ACMA under section 14 of the *Australian Communications and Media Authority Act 2005 (ACMA Act)* to take such action as the ACMA considers necessary or convenient to allocate and issue spectrum licences, authorising the operation of radiocommunications devices in the residual 700 MHz band (see subsection 8(2) of the *Radiocommunications (Spectrum Licence Allocation—Residual 700 MHz Spectrum) Direction 2016 (the Residual 700 MHz Spectrum Direction)*). The Minister has directed the ACMA, in allocating these spectrum licences, to offer the following two products sequentially:

- > a 2 x 10 MHz lot, representing the frequency ranges 738 MHz to 748 MHz and 793 MHz to 803 MHz; and
- > a 2 x 5 MHz lot, representing the frequency ranges 733 MHz to 738 MHz and 788 MHz to 793 MHz.

The Minister has also directed the ACMA to allocate the spectrum licences by way of auction.

Operation of the Determination

The Determination is one of a set of legislative instruments that gives effect to the Re-allocation Declaration and the Residual 700 MHz Spectrum Direction.

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

The allocation procedures describe the necessary application and registration process for parties to become eligible to participate and bid for lots at auction, or to obtain lots at a pre-determined price. This process includes the submission of required documentation and the payment of application fees, as well as the payment of a deposit or the provision of a deed of financial security.

Rules governing how applicants can bid on spectrum in the auction are also included in the Determination. The ACMA will auction spectrum in the residual 700 MHz band divided into the lots described above. Each lot is defined by a geographic boundary and frequency bandwidth.

The auction will be held via a secure online program using the SCA methodology. In this style of auction, before each round, the auction manager publishes a price (**the specified price**) for a lot that the bidder must meet to be eligible to place a bid in subsequent rounds. The specified price for each round is calculated in accordance with the Determination. In a round, a bidder can make a bid:

- > at the specified price for the round (**a continue bid**). This entitles the bidder to make a bid in the following round;
- > higher than the specified price for the round (**an advance price**). This is treated as a continue bid in the round it is made, and as a continue bid in any subsequent round where the value of the bid is higher than or equal to the specified price for that round, and as an exit bid in any subsequent round where the value of the bid is less than the specified price for that round; or
- > make a bid lower than the specified price for the round but equal to or higher than the specified price for the previous round (or, in the first round, equal to or higher than the starting price for the lot) (**an exit bid**). If a bidder makes an exit bid on a lot, that is the bidder's last bid for that lot.

The auction of a lot ends on the first occurrence of a round where there is no more than one bidder who has made a continue bid (including a continue bid at an advance price) on the lot, regardless of how many exit bids are made on the lot. The bidder who has made the highest bid (whether it is a continue bid, including a continue bid at an advance price, or an exit bid) is the winner of the lot. Where the highest bid is an exit bid, and two bidders have both made the same exit bid, a pseudorandom tiebreaker process will be used.

The **winning price** for that lot is the second highest bid made in the auction. This ensures that the winning bidder never pays more than necessary to win.

By section 6 of the Residual 700 MHz Spectrum Direction, the Minister has directed the ACMA to determine allocation procedures that impose limits on the aggregate of the parts of the spectrum that may be used as a result of the allocation of spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act (**allocation limits**). These allocation limits will apply in the course of this allocation process. The allocation limits have the effect of capping the total amount of spectrum in the 700 MHz band that a single bidder can be allocated. In the 700 MHz band, a bidder will be limited to a maximum of 2 x 20 MHz nationally, including any spectrum won at the original digital dividend auction in 2013. The Determination includes provisions designed to comply with section 6 of the Residual 700 MHz Spectrum Direction. These provisions include a requirement on each applicant and successful bidder to identify any associations with another applicant or successful bidder, and to identify any associations with either of the successful bidders at the original digital dividend auction in the 700 MHz band in 2013 (Optus Mobile and Telstra).

The Determination will also impose obligations to be met by successful bidders, or a successful applicant for a pre-determined price, in relation to the payment of the spectrum access charge. By section 7 of the Residual 700 MHz Spectrum Direction, the Minister has directed the ACMA to allow successful bidders and successful applicants to pay the spectrum access charges fixed under the Determination in instalments, subject to those instalments meeting certain conditions. The Determination includes provisions designed to comply with this direction. These provisions include a regime that allows a successful bidder or successful applicant to pay the spectrum access charge either upfront or by three annual instalments. If the successful bidder or successful applicant elects to pay

the spectrum access charge by three annual instalments, the spectrum access charge will be higher than it would have been had the bidder elected to pay it upfront, and the bidder will have to provide a bank guarantee securing part of the second and third instalments.

Other legislative instruments affect the re-allocation of spectrum in the residual 700 MHz band. These instruments provide additional information about the auction and the spectrum licences that will be available for allocation.

Under section 39A of the Act, a marketing plan for the residual 700 MHz band has been prepared. This marketing plan specifies the spectrum available and the conditions that will apply to its use under spectrum licences. The ACMA has also made a determination and advisory guidelines, under sections 145 and 262 of the Act, respectively. The determination made under section 145 defines unacceptable interference levels that devices used under spectrum licences to be issued under the Determination must comply with, in order to be registered on the Register of Radiocommunications Licences. The advisory guidelines provide additional interference management measures and set out requirements for registering devices with the ACMA that will operate under spectrum licences in the 700 MHz band.

A provision-by-provision description of the Determination is set out in the notes at **Attachment A**.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

The Determination incorporates the following Acts and legislative instruments by reference (including by the adoption of definitions), or otherwise refers to them:

- > the *Acts Interpretation Act 1901*;
- > the *A New Tax System (Australian Business Number) Act 1999*;
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- > the *Australian Communications and Media Authority Act 2005*;
- > the *Banking Act 1959*;
- > the *Competition and Consumer Act 2010*;
- > the *Corporations Act 2001*;
- > the *Radiocommunications (Spectrum Licence Allocation – Combinatorial Clock Auction) Determination 2012*;
- > the *Radiocommunications Spectrum Marketing Plan (700 MHz unallocated lots band) 2016 (the marketing plan)*;
- > the Re-allocation Declaration;
- > the Residual 700 MHz Spectrum Direction;
- > the *Telecommunications Act 1997*.

The Acts and legislative instruments listed above may be obtained from the Federal Register of Legislation (<http://www.legislation.gov.au>). The Acts are incorporated as in force, from time to time, in accordance with section 10 with the *Acts Interpretation Act 1901* and subsection 13(1) of the LA. The legislative instruments listed above are incorporated as in force, from time to time, in accordance with section 5 of this Determination and subsection 14(1) of the LA.

Consultation

Before the Determination was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

Consultation in relation to the 2013 auction

The ACMA consulted extensively with stakeholders about its plans for the re-allocation of the 700 MHz and 2.5 GHz bands generally in the lead up to the 2013 allocation of spectrum licences.

For detail of the consultation processes undertaken in the 2013 process see the Explanatory Statement for the *Radiocommunications (Spectrum Licence Allocation – Combinatorial Clock Auction) Determination 2012*, available from the Federal Register of Legislation (www.legislation.gov.au).

Recent consultation

A draft version of the Determination was released for public consultation on 21 October 2016, together with the explanatory information paper [Draft allocation instruments for 700 MHz spectrum - unsold lots auction](#). Consultation closed on 17 November 2016.

The ACMA received a total of 9 written submissions to this information paper. The ACMA took the views of stakeholders into consideration during the revision of the Determination. Two submissions dealt with the matters of lot configuration and whether to allocate the two lots concurrently rather than sequentially. However, the Minister has directed the ACMA on both these matters.

In accordance with subsection 60(14) of the Act, the ACMA consulted with the Australian Competition and Consumer Commission (ACCC) about whether the procedures in this Determination should include a requirement that the ACMA give specified information to the ACCC and, if so, the nature of that requirement. The ACMA consulted with staff of the ACCC by email in September 2016. Section 84 has been included in the Determination as a result of that consultation.

Regulatory impact assessment

Prior to making the Determination, the ACMA was informed that the Office of Best Practice Regulation (**the OBPR**) considered that the proposal to allocate licences for the residual 700 MHz band was sufficiently related to previous processes considered by the OBPR, including the allocation that occurred in 2013, that it was exempt from the requirement for a Regulation Impact Statement for this legislative instrument (OBPR reference 20916).

Statement of compatibility with human rights

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 LA applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement, to the extent it applies to this Determination.

Overview of the instrument

On 1 November 2011, following recommendations from the ACMA, the Minister for Broadband, Communications and the Digital Economy made a declaration that specific parts of the spectrum in the 700 MHz band would be subject to re-allocation by spectrum licensing under section 153B of the Act. The specific parts of the spectrum declared for re-allocation are set out in the Re-allocation Declaration, and consist of the frequency ranges 703 MHz to 748 MHz and 758 MHz to 803 MHz. This spectrum was offered as part of the digital dividend auction for the 700 MHz and 2.5 GHz bands that was held in 2013. After that auction, 2 x 15 MHz of the 700 MHz band remained unallocated (namely, the residual 700 MHz band).

Explanatory Statement to the Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016

The Minister has given the ACMA the Residual 700 MHz Spectrum Direction. In complying with that direction, the ACMA has made this Determination. Broadly speaking, the Residual 700 MHz Spectrum Direction requires the ACMA to allocate spectrum licences for the residual 700 MHz band by auction.

Under subsection 60(1) of the Act, the ACMA must determine the procedures for allocating spectrum licences by auction, tender or for a pre-determined or negotiated price. The Determination is made, in substantial part, under that section. The Determination sets out the procedures to be applied in allocating spectrum licences in the residual 700 MHz band. These licences will be allocated in a single auction using the SCA methodology. If, in particular circumstances, the ACMA considers there is no need for an auction, the Determination allows the ACMA to allocate a licence to an applicant without conducting an auction. To the extent that this Determination is made under subsection 60(1) of the Act, it is not a disallowable instrument (see item 29 in the table at regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

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. The Determination fixes the spectrum access charges payable by the persons to whom spectrum licences in the residual 700 MHz band are allocated, by reference to the winning bids at the auction (or, if there is no auction, by reference to starting prices set by the ACMA). To the extent that the Determination 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 Determination is made under subsection 294(1) of the Act. To the extent that this Determination is made under subsection 294(1) of the Act, it is a disallowable instrument.

Subject to compliance with the allocation limits required to be included in the Determination by the Residual 700 MHz Spectrum Direction, any person may apply to participate in the auction to be held in accordance with the Determination.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

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

Notes to the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*

PART 1 – PRELIMINARY

Section 1 Name

This section provides for the Determination to be cited as the *Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016*.

Section 2 Commencement

The section provides for the Determination to commence at the start of the day after it is registered on the Federal Register of Legislation.

Section 3 Authority

This section identifies the Act that authorises the making of the Determination, namely the *Radiocommunications Act 1992*.

Section 4 Interpretation

This section defines a number of key terms used throughout the Determination, and signposts where other key terms are defined in the Determination. A number of other expressions used in the Determination are defined in the Act.

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 5 References to other legislative instruments, other instruments or writing

This section provides that 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, and a reference to another instrument or writing is a reference to that instrument or writing as existing from time to time.

Section 6 Giving documents to ACMA

This section sets out requirements for lodging documents with the ACMA, including the alternative means by which documents can be lodged. These requirements apply to any documents being lodged with the ACMA for the purpose of the allocation process under the Determination. They are intended to work with section 29 (Making an application), section 34 (Requirement for new application), section 37 (Giving preference nomination form) and section 38 (Deposit or deed of financial security required), among other sections.

A person may give a document 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 prescribes 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.

Explanatory Statement to the Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016

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

Section 7 Payment of amounts

This section prescribes the manner in which payments under the Determination must 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 a person pays an amount by bank cheque, the payment must be made by the deadline specified in, or set in accordance with, the Determination.

Where electronic transfer is used to make a payment, the ACMA must receive from the person making the payment evidence (such as a transfer receipt) that an electronic transfer has been made for the full amount. A person will be taken to have made a payment by the specified or set deadline, provided the ACMA receives the full amount in the ACMA's nominated bank account within 3 working days of the deadline and the person gives the ACMA evidence that the transfer was made on or before the deadline. Where full payment is not received within 3 working days, the payment will only be taken to have been made if the person making the payment can show that it has taken all reasonable steps to ensure that the amount was paid by the due date.

This section also provides 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. It is in the interests of the person making the payment to ensure 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.

Any amount to be paid under the Determination that is not an amount in whole dollars is to be rounded up to the next dollar.

Section 8 Statutory declaration for body corporate

This section provides that where the Determination requires a body corporate to make a statutory declaration, such a declaration must be made by a director or a secretary of that body corporate.

PART 2 LIMITS ON ALLOCATION OF SPECTRUM

Section 9 Simplified outline of this Part

This section sets out a simplified outline of Part 2.

Section 10 Meaning of *allocation limits*

The Minister has given the ACMA written directions under subsection 60(10) of the Act (see section 6 of the Residual 700 MHz Spectrum Direction), which require the ACMA to determine procedures that impose limits on the aggregate parts of the spectrum that, as a result of the allocation of spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act, may in total be used by the members of a specified group of persons, namely, any person and that person's associates.

This section defines the limits on the aggregate of the parts of the 700 MHz band that, as a result of the allocation of spectrum licences in the residual 700 MHz band under the Determination and in other parts of the 700 MHz band under the *Radiocommunications (Spectrum Licence Allocation—*

Combinatorial Clock Auction) Determination 2012 (the **previous Allocation Determination**) may be used by any one person or specified groups of persons.

The Residual 700 MHz Spectrum Direction requires the allocation limits to be no more than:

- > 20 MHz of spectrum in the frequency band 703 MHz to 748 MHz;
- > 20 MHz of spectrum in the frequency band 758 MHz to 803 MHz;

in the ‘designated area’, that is, Australia, excluding the Mid West Radio Quiet Zone.

For more information, including as to the Mid West Radio Quiet Zone, see the marketing plan, and its associated explanatory statement.

Section 11 Meaning of *associate*

The Minister has directed the ACMA to apply allocation limits on the amount of spectrum in the 700 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 4(1) of the Residual 700 MHz Spectrum Direction defines **specified group of persons** as the applicant for a spectrum licence and all the applicant’s ‘associates’. This section also defines the term **associate**, in relation to a person, for the purposes of determining who is within a specified group of persons. The Determination adopts these definitions in largely the same terms for the purpose of complying with the allocation limits. An associate of a person includes any person that is a party to a ‘relevant agreement’ with the person, as defined under subsection 11(2), in the same way that it is defined in the Residual 700 MHz Spectrum Direction.

The inclusion of parties to a ‘relevant agreement’ as associates covers 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’.

Section 12 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 bidders. These procedures have the effect of helping to ensure that the allocation limits set out in the Determination are not exceeded.

This section sets out 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, two applicants or bidders are affiliated if they are associates of each other or they have an associate in common. An example would be where two applicants or bidders have a director in common. This is included in order to comply with section 6 of the Residual 700 MHz Spectrum Direction.

Section 13 Affiliation between applicant or bidder and previous successful bidder

An applicant or bidder is affiliated with a previous successful bidder if: either the previous successful bidder and the applicant or bidder are associates of each other; or if the specified group of persons in relation to the applicant or bidder has at least one member in common with the specified group of

persons in relation to the previous successful bidder. This means that an applicant or bidder will be taken to be affiliated with a previous successful bidder if they have an associate in common.

If an applicant or bidder is affiliated with a previous successful bidder, they are taken to be in a single specified group of persons for the purpose of the allocation limits. This section is recursive, so that one or more previous successful bidders, and one or more applicants or bidders, may be taken to be in a single specified group of persons for the purpose of the allocation limits. This is included in order to comply with section 6 of the Residual 700 MHz Spectrum Direction.

Section 14 Information relevant to considering whether applicants, bidders or previous successful bidders are affiliated

This section sets out what matters the ACMA must take into account in considering whether an affiliation exists between two or more applicants or bidders, or whether one or more applicants or bidders are affiliated with one or more previous successful bidders, namely, the documents and information given by applicants and bidders under the Determination. The ACMA may have regard to any other information it considers relevant in determining whether two or more applicants or bidders are affiliated, or one or more applicants or bidders are affiliated with one or more previous successful bidders, including any applications forms lodged under the previous allocation Determination.

PART 3 CONFIDENTIALITY

Section 15 Simplified outline of this Part

This section sets out a simplified outline of Part 3.

Section 16 Meaning of *confidential information*

The definition of the term **confidential information** forms the basis of the confidentiality rules imposed by this Part. The definition includes information that could give rise to collusion or price-signalling (both deliberate and inadvertent) if disclosed, such as information about a bid, or about proposed bids of an applicant or bidder, an applicant's or bidder's bidding strategy, or the amount an applicant or bidder is 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 preference nomination form) and information provided to a bidder by the ACMA 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 bids, proposed bids or bidding strategy or the outcome of the allocation process.

Section 17 Obligation not to disclose confidential information

This section provides that an applicant or bidder must not disclose its confidential information to any person, other than in the case of specific exceptions listed in the section. This confidentiality obligation also applies to a related person of an applicant or bidder who has knowledge of the applicant's 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 17(2) sets out the exceptions to the prohibition on the disclosure of confidential information. These include where an applicant or bidder discloses confidential information to a related person of that 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 section 17) will also be able to be disclosed.

Section 18 Duration of confidentiality obligations

In order to protect against collusion and price-signalling (whether deliberate or inadvertent) 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 when, after the relevant allocation process (either auction or allocation for a pre-determined price), the confidentiality obligations for an applicant or bidder, and for a related person of an applicant or bidder, will end. 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 45(1) or 46(1), the bidder is notified that the bidder is not a winning bidder under subsection 67(1), the applicant (who has withdrawn) is notified under subsection 67(3) that the applicant's confidentiality obligation is at an end, or the bidder is asked to make a statement as a winning bidder under section 68).

Section 19 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. This applies where the applicant or bidder, or related person of the applicant or bidder, discloses the confidential information or receives confidential information from another applicant, bidder or related person.

Section 20 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 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.

Section 21 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 the rules regarding the disclosure of confidential information throughout the allocation process. It is 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 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, unless the director or secretary is also an employee of the 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

Division 1 Simplified outline

Section 22 Simplified outline of this Part

This section sets out a simplified outline of Part 4.

Division 2 Preliminary

Section 23 Auction manager

This section provides 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.

Section 24 Setting application fee

This section provides 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 25 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.

Division 3 Advertising the auction

Section 26 Advertising of auction by ACMA

This section provides that the ACMA must publish a notice on its website (www.acma.gov.au) inviting interested persons to apply to the ACMA to participate in the auction. The notice will specify the spectrum to be allocated and will describe in general terms how the allocation will proceed. It will also inform prospective applicants how they may obtain the applicant information package (**AIP**) that will explain the allocation process in greater detail.

The deadlines for lodging the documentation and payments required for an application (**application deadline**) and preference nomination (**preference deadline**) 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) provides that the ACMA may also publish the information provided in the advertisement, and other information about the auction, by other means.

Section 27 Applicant information package

The 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, the Re-allocation Declaration, and the Residual 700 MHz Spectrum Direction, which are the instruments that provide the legal basis for the allocation process.

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 be allocated and issued 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 preference nomination form (which will be provided later). The ACMA may provide forms for the bank guarantees referred to in subsections 44(6) and 75(7) in the AIP; if it does not, it will provide those forms by other means.

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 27(1)(e)).

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

Section 28 Starting prices

This section provides that the ACMA must set the starting price for each of the two lots to be allocated. The starting price for a lot is the floor for bids on the lot in the auction or, if there is no auction, is the basis for calculating the spectrum access charge for a spectrum licence issued for that lot. It will not be possible within the auction system for an applicant to place a bid for an amount below the starting price. The starting price for a lot must be set in a manner consistent with the Residual 700 MHz Spectrum Direction.

After setting the starting price, the ACMA must approve a preference nomination form to be completed by applicants as part of the process of registering as a bidder. The ACMA must publish each amount set under this section, and the approved preference nomination form on its website.

The preference nomination form must be used by each applicant to nominate its preferred lots. Each applicant who is registered as a bidder will only be able to bid during the auction on a lot it has nominated in the preference nomination form. This requirement will maximise the possibility of allocating lots in the most effective manner. The ACMA may also use the information in a preference nomination form to decide whether it can allocate licences without conducting an auction (see Part 5 of the Determination). It will be necessary for applicants to know the starting prices for lots to

calculate the percentage of the starting prices required for the deposit or deed of financial security required to be provided by section 38 for the applicants' preferred lots.

Division 4 Application to participate in auction

Section 29 Making an 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 requires those documents and forms to be accompanied by the application fee. 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 24, in the manner specified in section 7.

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

The confidentiality provisions in section 17 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 6. An applicant may also lodge an updated document at any time prior to the application deadline, but not afterwards.

Section 30 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 31 Applicant to provide statutory declaration

To ensure that affiliated applicants do not participate in the auction as separate bidders, potentially leading to a contravention of the allocation limits or the disclosure of confidential information, and to ensure that an applicant affiliated with a previous successful bidder is not allocated a spectrum licence in contravention of the allocation limits, the ACMA has included procedures to identify such affiliations before the commencement of the auction. This provision sets out the requirements that will assist the ACMA to identify whether two or more applicants are affiliated, or whether an applicant is affiliated with a previous successful bidder. As mentioned above, Telstra and Optus Mobile are the two previous successful bidders.

After the application deadline, the ACMA will provide each applicant with a list of all other applicants, the persons those applicants have identified as their associates, and both previous successful bidders. The information distributed about applicants 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, including information in relation to previous successful bidders.

The ACMA will ask each applicant to identify from the list provided by the ACMA whether it is affiliated with any other applicant or with a previous successful bidder. Under this section, each

applicant must then make a statutory declaration to the ACMA stating whether it is affiliated with another applicant, or with a previous successful bidder who is not also an 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.

Section 32 Failure to provide statutory declaration

This section sets out the consequences of failing to provide a statutory declaration in accordance with section 31. Applicants who do not provide the statutory declaration in the manner set out in section 31 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 licences under the Determination.

Section 33 Procedure if ACMA satisfied applicants affiliated

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

Under this section, the ACMA must write to each affiliated applicant and explain the reasons why it considers them to be affiliated. The ACMA must also tell all affiliated applicants of the options available to them under this section. Affiliated applicants are required to notify the ACMA in writing within 10 working days of receiving notification from the ACMA 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 34; 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 10 working days of the notification. If affiliated applicants elect to take the second option, but two or more of them do not withdraw their applications by the preference deadline, each of those applicants will be taken to have withdrawn their applications (such that none of the affiliated applicants will be able to participate in the allocation process).

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 section 39).

Section 34 Requirement for new application

This section allows a group of affiliated applicants who have withdrawn all of their applications, as set out in subsection 33(1), to make a new application through a body corporate whose only members are one or more of those affiliated applicants. The section sets out the process and timeframe for the body corporate to lodge a new application. A new application made under this section must be accompanied by an additional payment of the application fee.

A new applicant under this section will have 10 working days, from the time that the group of affiliated applicants is notified of the affiliation under subsection 33(1), 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 who has not withdrawn its application, including the new applicant, updated details of all other applicants who have not withdrawn, and their identified associates.

The new applicant will then have three working days from the time it is given these updated details 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 (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.

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 are not exceeded.

Section 35 Procedure if ACMA satisfied that applicant is affiliated with a previous successful bidder

If the ACMA is satisfied that an applicant is affiliated with a previous successful bidder and that previous successful bidder is not also an applicant, the ACMA must, in writing, notify the applicant and tell them the basis on which the ACMA is satisfied the applicant is affiliated with a previous successful bidder. If the previous successful bidder is also an applicant, section 33 applies. An applicant who is affiliated with a previous successful bidder may not be able to nominate a particular lot, or both lots, as its preferred lots under section 37, or to bid on the 5 MHz lot in particular circumstances specified under Schedule 1.

Division 5 Setting the bid increment percentage

Section 36 Bid increment percentage

After the application deadline, the ACMA must set the bid increment percentage for both lots as a percentage of the starting price for the lot in the first round, and of the specified price for the lot in any other round.

The specified price in the first round for a lot will be the starting price plus the bid increment percentage multiplied by the starting price. A person wishing to bid on that lot must make either a continue bid (including a continue bid that is at an advance price) in order to continue to bid in future rounds, or make an exit bid. For a round (**the current round**), the specified price for the next round for a lot is calculated by adding a percentage increment of the specified price for the current round for that lot to the specified price for the current round.

For example, if the starting price for a lot is \$100, and the bid increment percentage is 10 per cent, then:

- > the specified price for the first round is $\$100 + \$10 = \$110$, and:
 - a bid in the first round greater than or equal to \$100, but less than \$110, is an exit bid;
 - a bid in the first round equal to \$110 is a continue bid;
 - a bid in the first round at an advance price (that is, greater than \$110) is a continue bid for the first round;

- > the specified price for the second round is $\$110 + \$11 = \$121$, and:
 - a bid in the second round greater than or equal to \$110, but less than \$121, is an exit bid;
 - a bid in the second round equal to \$121 is a continue bid;
 - a bid in the second round at an advance price (that is, greater than \$121) is a continue bid; and
 - a bid in the *first* round greater than or equal to \$121 (that is, a continue bid at an advance price in the first round) is taken to be a continue bid for the second round.

See Schedule 1 for more information about the rules of the auction.

During the auction, the auction manager can vary the bid increment percentage, which will affect the specified price of lots in rounds after the variation, after fulfilling the consultation requirements set out in clause 6 of Schedule 1 to the Determination.

Division 6 Preference nomination and financial security

Section 37 Giving preference nomination form

This section sets out the requirement for an applicant to nominate its preferred lots for the auction by lodging a preference nomination form with the ACMA by the preference deadline. Note that an applicant's nominated preferred lots are subject to the allocation limits, which will be assessed by reference to any spectrum licences in the 700 MHz band held by the applicant (if the applicant is a previous successful bidder) or held by a previous successful bidder that is also an associate of the applicant.

The preferred lot nominations by applicants will constrain the lots that they will be able to bid for in the auction. Applicants will select their preferred lots nomination by completing a preference nomination form.

Subject to subsections (3) and (4) (which relate to the effect of the allocation limits), an applicant may nominate the 10 MHz lot or the 5 MHz lot, or both the 10 MHz lot and the 5 MHz lot, as its preferred lots.

If an applicant becoming the successful applicant or winning bidder for one of the lots would exceed the allocation limits, subsections (3) and (4) prevent that applicant from nominating that lot as one of its preferred lots.

If an applicant becoming the successful applicant or winning bidder for both lots would result in the applicant being able to use spectrum in excess of the allocation limits, but the same is not true if the applicant became the successful applicant or winning bidder for one of the lots, Schedule 1 prevents that applicant from bidding on the 5 MHz lot if the applicant is the winning bidder for the 10 MHz lot.

Applicants may vary their preferences by submitting a new preference nomination form; however, this must be lodged before the preference deadline. If an applicant changes its preferred lots before the preference deadline, consequential changes to the deposit or amount under the deed of financial security that the applicant has provided under section 38 must be made to match the new deposit or deed of financial security required.

If an applicant does not nominate its preferred lots by the preference deadline or its subject to allocation limits for the 5 MHz lot as set out in subsection 37(4), the applicant is taken to have

withdrawn its application. The ACMA must tell an applicant in writing if it is taken to have withdrawn its application under subsection 37(6).

Section 38 Deposit or deed of financial security required

An applicant must pay a deposit or provide a deed of financial security, or a combination of both, to the ACMA by the preference deadline. The amount to be secured, in relation to an applicant, is:

- > if the applicant nominated only the 5 MHz lot as its preferred lot – 10 per cent of the starting price of the 5 MHz lot; or
- > if the applicant nominated only the 10 MHz lot, or both the 5 MHz lot and the 10 MHz lot, as its preferred lot – 10 per cent of the starting price of the 10 MHz lot.

A situation may arise where the amount provided to the ACMA by an applicant as security at the preference nomination deadline is less than the amount that is due based on the lots that an applicant has nominated in their preference nomination form. Applicants have three working days to provide the ACMA with an additional deposit or deed of financial security to make up the balance to secure the number of preferred lots that they have nominated. However, if such an underpayment exists after this three working day period, then the applicant's preferred lots are worked out by the ACMA as follows:

- > if the applicant has nominated only one lot as its preferred lot – the applicant is taken to have withdrawn its application;
- > if the applicant nominated both lots, and 10 per cent of the starting price for the 5 MHz lot is equal to or less than the amount of the deposit paid or the deed of financial security given (or both)– the applicant is taken to have nominated only the 5 MHz lot as its preferred lot;
- > in any other case, the applicant is taken to have withdrawn its application.

The ACMA must tell an applicant in writing if it is taken to have withdrawn its application under subsection 38(4).

A deed of financial security given to the ACMA under section 38 must be executed by an Australian-owned authorised deposit-taking institution within the meaning of the *Banking Act 1959* which is a bank. 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 preference deadline for the deed to be considered to have been given to the ACMA. Under subsection 38(8), the ACMA may at its discretion agree to the provision of an original deed of financial security at a later time.

Under section 38, 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 an Australian-owned authorised deposit-taking institution within the meaning of the *Banking Act 1959* which is a bank.

Division 7 Withdrawal

Section 39 Withdrawal of application

This section provides 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 preference deadline; however, it must inform the ACMA of this in writing. An applicant who has withdrawn will not be re-admitted to the auction.

Subject to sections 85 and 88, any deposit amount paid by an applicant under subsection 39(1) who withdraws before the preference deadline, or that is taken to have withdrawn under other sections of the Determination, will be refunded. Under section 25, any application fee paid by an applicant who withdraws will not be refunded.

PART 5 ALLOCATION FOR A PRE-DETERMINED PRICE

Section 40 Simplified outline of this Part

This section sets out a simplified outline of Part 5.

Section 41 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 58, 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 person willing to make the highest value payment for allocation of a spectrum licence without conducting an auction.

Any offer of a spectrum licence made under this Part will be conditional on payment of the spectrum access charge.

Section 42 ACMA must have regard to applicants' requirements

In deciding under subsection 41(1) 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 preferred lots provided through their preference nomination forms or through other information about preferred lots provided by applicants to the ACMA. The allocation limits may affect the lots an applicant may nominate as its preferred lots.

Section 43 The upfront pre-determined price and the delayed pre-determined price

This section sets out how the pre-determined price is calculated for a spectrum licence. As mentioned above, the Residual 700 MHz Spectrum Direction requires the ACMA to allow a successful applicant to pay the spectrum access charge in three instalments, subject to certain conditions being met. One of those conditions is that the 'present value' of the instalment payments must total the amount determined in accordance with the allocation process. Under this Part, the amount determined in accordance with the allocation process for a spectrum licence is the sum of the starting prices for the lots to be included in that 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 28) for the **upfront pre-determined price**. If a successful applicant chooses to pay the entire spectrum access charge up front, the upfront pre-determined price is the spectrum access charge for the spectrum licence to be issued to the successful applicant.

The **balance of the upfront pre-determined price** for a spectrum licence is the upfront pre-determined price less the amount of any deposit paid by the applicant.

The **delayed pre-determined price** for a spectrum licence is the sum of:

- (a) the deposit paid by the successful applicant for the licence under section 38 (if any);
- (b) the first instalment for the licence;
- (c) the second instalment for the licence; and
- (d) the third instalment for the licence.

The first, second and third instalments to be paid in relation to a spectrum licence are calculated by reference to the starting prices for the lots to be included in the licence (see section 46). The starting price is set by the ACMA under subsection 28(1). The ACMA must set starting prices in a manner that is consistent with the Residual 700 MHz Spectrum Direction.

The sum of the 'present value' of each of the instalments, and of the deposit (if any), is the same as the sum of the starting prices for the lots to be included in the licence, when calculated in accordance with the Residual 700 MHz Spectrum Direction. See below for further discussion on the calculation of the instalments.

Section 44 Offer of spectrum licence and decision on pre-determined price

This section sets out the procedures that the ACMA will undertake when offering spectrum licences for a pre-determined price. The ACMA will send each relevant applicant, by registered mail, a draft of the spectrum licence or licences that may be allocated to the applicant and a notice stating:

- (a) that the applicant is offered a spectrum licence for the relevant lots to be included in that licence;
- (b) the amount of the upfront pre-determined price payable for the licence;
- (c) the amount of the delayed pre-determined price payable for the licence;
- (d) the amount of any deposit paid by the applicant and held by the ACMA or the Commonwealth;
- (e) the balance of the upfront pre-determined price.

An applicant who wishes to accept the ACMA's offer must do so by notifying the ACMA in writing within 10 working days of receiving the offer and agreeing, in writing, to pay either the balance of the upfront pre-determined price for the spectrum licence in accordance with section 45 or to pay the delayed pre-determined price for the spectrum licence in accordance with section 46. If an applicant does not accept the offer of a spectrum licence, section 47 applies.

If an applicant accepts the offer of the spectrum licence and agrees to pay and pays the balance of the upfront pre-determined price, the applicant is entitled to be issued the spectrum licence offered to it in accordance with section 45.

Subject to subsection 44(6), if an applicant accepts the offer of the spectrum licence and agrees to pay the delayed pre-determined price for the spectrum licence in accordance with section 46, the applicant is entitled to be issued the spectrum licence offered to it on payment of the first instalment in accordance with section 46. However, the applicant is not entitled to be issued a spectrum licence under the delayed pre-determined price arrangement unless the applicant also gives the ACMA an irrevocable bank guarantee securing the 'secured amount'. In accordance with the Residual 700 MHz

Spectrum Direction, the **secured amount** is five per cent of the amount of spectrum access charge that remains unpaid (that is, five per cent of the second and third instalments, reducing to five per cent of the third instalment after the second instalment is paid).

This bank guarantee must be issued by an Australian-owned authorised deposit-taking institution (as defined in the *Banking Act 1959*) which is a bank, in a form approved by the ACMA (**delayed pre-determined price bank guarantee**), no later than the date mentioned in paragraph 46(2)(a) (that is, the date by which the first instalment must be paid).

If the applicant fails to pay an instalment other than the first instalment in accordance with section 46, the applicant may be in breach of the licence condition required to be included in a spectrum licence by section 67 of the Act, and the ACMA or the Commonwealth may require the authorised deposit-taking institution that has issued the delayed pre-determined price bank guarantee to pay the amount secured by that bank guarantee. Nothing in the Determination limits the other rights or remedies the ACMA or the Commonwealth has against a person, including against the authorised deposit-taking institution that has issued the delayed pre-determined price bank guarantee.

If a spectrum licence is issued to an applicant in accordance with subsection 44(5), each of the first instalment, the second instalment and the third instalment is not refundable in any circumstances.

If a delayed pre-determined price bank guarantee is given to the ACMA by email or fax before the date mentioned in subsection 44(6), the original guarantee must be received by the ACMA no later than three working days after that date (or, if the ACMA agrees to a later time, the agreed time) for the guarantee to be taken to have been given to the ACMA.

Section 45 Payment of the balance of the upfront pre-determined price

This section sets out the arrangements where an applicant accepts the offer of a licence or licences at the upfront pre-determined price. The ACMA must notify the applicant by registered mail of the balance of the upfront pre-determined price payable for all spectrum licences that the applicant is entitled to be issued. The balance of the upfront pre-determined price for a spectrum licence is payable no later than 31 January 2018, and must be paid in accordance with the payment arrangements that are outlined in section 7.

Section 46 Payment of the delayed pre-determined price

If an applicant accepts the offer of a spectrum licence and agrees to pay the delayed pre-determined price for the licence, the ACMA must notify the applicant by registered mail that the ACMA has received the applicant's acceptance.

The delayed pre-determined price for a spectrum licence is payable in accordance with the following schedule:

- (a) an instalment of:
 - (i) 48.0051 per cent of the gross price for the licence; less
 - (ii) the deposit (if any) paid by the applicant under section 38;(the **first instalment** for the licence) must be paid no later than 31 January 2018;
- (b) an instalment of 26.6315 per cent of the gross price for the licence, multiplied by 1.05 (the **second instalment** for the licence) must be paid no later than 31 January 2019; and

- (c) an instalment of 25.3634 per cent of the gross price for the licence, multiplied by 1.1025 (the **third instalment** for the licence) must be paid no later than 31 January 2020.

For the purposes of calculating the instalments, the **gross price** for a licence is the sum of the starting prices for each of the lots to be included in the licence.

In announcing his intention to direct the ACMA to conduct an auction in October 2016, the Minister wrote to the ACMA, indicating that he is considering directing the ACMA to allow successful bidders to pay the auction winning price ‘in a manner consistent with the payment arrangement outlined in the draft ministerial direction to the ACMA on VHA’s March 2016 proposal’ (see the Minister’s letter to the Acting Chair of the ACMA, available on the ACMA’s webpage for [consultation](#) on the Determination). The reference to ‘VHA’s March 2016 proposal’ is a reference to a proposal put forward by Vodafone Hutchison Australia, on which the Department of Communications and the Arts publicly consulted between 6 May and 10 June 2016. The ACMA consulted on the basis that the instalment percentages would be the same as those in that proposal.

The percentages in the Determination for the instalment payments vary slightly from those included in VHA’s March 2016 proposal. The ACMA has sought to keep close to those percentages, while complying with the requirement in the Residual 700 MHz Spectrum Direction to ensure that the present value of the total spectrum access charge payable (that is, the delayed pre-determined price) be the same (when rounded to the nearest \$1,000) as the amount determined in accordance with the allocation procedures (that is, the sum of the starting prices for the lots included in the relevant spectrum licence). The Residual 700 MHz Spectrum Direction requires that the ‘present value of the total spectrum access charges’ be calculated as the sum of the present values of the instalments. For this purpose, the ACMA treats the deposit as being paid at the same time as the first auction instalment.

In accordance with the Residual 700 MHz Spectrum Direction, the payment arrangements have been determined so that the present value of the first instalment payment is the same as the amount of that payment. The present value of subsequent instalment payments have been calculated as being the amount of that instalment payment reduced at the rate of five per cent per annum for the period from the date that instalment payment is payable to the date the first instalment payment is payable.

The ACMA has set the percentages for the second and third instalments so that, when allowing for the reduction in present value described above, the amount to be paid in the second and third instalments is almost the same.

If an applicant accepts the offer of a spectrum licence and agrees to pay the delayed pre-determined price for the licence, the applicant must give the ACMA the delayed pre-determined price bank guarantee in accordance with subsection 44(6) by 31 January 2018.

Each instalment must be paid in accordance with the payment arrangements that are outlined in section 7.

Section 47 Allocation if offer refused

This section sets out the procedures that will apply if an applicant does not accept, in accordance with subsection 44(3), a spectrum licence that has been offered to it through the pre-determined price allocation. In this case, the ACMA may allocate those lots by auction, in accordance with the Determination, or remove those lots from the allocation process.

Section 48 Default

This section sets out the consequences that apply if an applicant does not pay the balance of the upfront pre-determined price after accepting the ACMA's offer of a spectrum licence in accordance with section 45. 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 for which the applicant has not paid the balance of the upfront pre-determined price are taken to be unallocated spectrum under section 80 of the Determination.

This section also sets out the consequences that apply if an applicant accepts the offer of a spectrum licence and agrees to pay the delayed pre-determined price for the licence, but either, or both:

- (a) does not pay the first instalment in accordance with section 46; or
- (b) does not give the ACMA the delayed pre-determined price bank guarantee in accordance with subsection 44(6).

In this case, the spectrum licence is not allocated to the applicant, but the allocation of spectrum licences to other applicants is not affected. The lots included in the spectrum licence or licences in this case are taken to be unallocated spectrum under section 80 of the Determination.

If the applicant fails to pay an instalment other than the first instalment, the applicant may be in breach of the licence condition required to be included in a spectrum licence by section 67 of the Act, and the ACMA or the Commonwealth may require the authorised deposit-taking institution that has issued the delayed pre-determined price bank guarantee to pay the amounts secured by that bank guarantee. Nothing in the Determination limits the other rights or remedies the ACMA or the Commonwealth has against a person, including against the authorised deposit-taking institution that has issued the delayed pre-determined price bank guarantee.

Section 49 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 and the upfront (or delayed) pre-determined price for each spectrum licence to be issued to that person.

PART 6 AUCTION PROCEDURES

Division 1 Simplified outline

Section 50 Simplified outline of this Part

This section sets out a simplified outline of Part 6.

Division 2 Application of this Part

Section 51 Lots to which this Part applies

This Part applies in relation to the 10 MHz lot and the 5 MHz lot. However, this Part does not apply in relation to a lot if the lot is included in a spectrum licence that is offered to an applicant under Part 5, and the applicant accepts that offer, or if the ACMA decides under section 47 to remove the lot from the allocation process.

Division 3 Registration of bidders

Section 52 Register of bidders

This section provides that the ACMA must maintain an electronic register of bidders. It also provides a list of details that the register must contain.

Bidders must inform the ACMA if they become aware of any change to the details included on the register, and provide updated information. The ACMA must update the register accordingly.

Section 53 Registration process

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

- (a) submitted a valid application;
- (b) lodged a completed preference nomination form; and
- (c) paid the applicable deposit or provided a deed of financial security, or a combination of the two, in accordance with the requirements in section 38.

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

This section also provides that the ACMA must, after the preference 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 **confidential information** under section 16.

Section 54 Bidder to notify ACMA if register incorrect

The section provides 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 55 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. In addition, the ACMA intends to provide bidders with a user guide to assist in accessing and using the auction system.

Section 56 Security of auction

This section imposes an obligation 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 4 Setting elements of the auction

Section 57 Auction procedures

This section provides that the first round of the auction starts on the date and time for that round set under subsection 58(1). The rounds of the auction will be scheduled and conducted in accordance with the rules in Schedule 1 of the Determination.

Section 58 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 preference 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 5 Procedures for bids not using the auction system and for exceptional circumstances

Section 59 Auction manager's discretion to accept bids

Subsection 59(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 bid 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 bidder to bid for a round by an alternative method. Bidders will receive information about how they can request to submit a bid if they are unable to use the auction system, once they are registered under section 53.

Under subsection 59(2), the auction manager also has discretion to permit a bidder to submit a bid after the round has ended, but only if satisfied that technical or communication problems have prevented the bidder from submitting a bid during the round. Bids that have been submitted in this way will be regarded as valid bids made during the round for the purposes of calculating the results of a round just ended. Details of the information about the outcome of the round to be provided to bidders are outlined in Schedule 1. However, a bidder will not be permitted to make a bid in this way after the results of the relevant round have been published to all bidders.

Section 60 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 60(1) allows the auction manager to take a range of actions to deal with these circumstances. These actions can include making corrections to the results of the current round of the auction and the information received by a bidder after the round just ended, 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 entirely.

Subsection 60(2) 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 or a breach of confidentiality obligations under section 17. However, the examples given are not exhaustive and do not preclude other circumstances from being regarded as exceptional.

Division 6 Affiliations during the auction

Section 61 Affiliation between bidders during auction period not permitted

This section provides that a bidder must not be affiliated with another bidder during the auction period (as defined in subsection 4(1) of the Determination). If the ACMA is satisfied that a breach of this provision has occurred, the ACMA may take action under section 85.

Section 62 Requirement to report affiliation

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

Section 63 Auction continues despite possible affiliation

This section prescribes what happens if the ACMA becomes aware during the auction period that two or more bidders, or a bidder and a previous successful bidder, may be affiliated. The auction will proceed normally and any bidders who may be affiliated are permitted to continue to participate.

Section 64 ACMA consideration of affiliation

If the ACMA has reason to believe that two or more bidders are affiliated during the auction period, the ACMA must notify the bidders in writing and tell them the basis on which the ACMA believes the bidders are affiliated.

If the ACMA has reason to believe that a bidder is affiliated with a previous successful bidder during the auction period, and the bidder had not made this known to the ACMA before the commencement of the auction period, the ACMA must notify the bidder in writing and tell it the basis on which the ACMA believes that the bidder is affiliated with a previous successful bidder.

If a bidder notified the ACMA about a possible affiliation under section 62, but the ACMA does not consider that these bidders are affiliated, then the ACMA must notify the bidders of that view.

If a bidder notified the ACMA about a possible affiliation with a previous successful bidder under section 62, but the ACMA does not consider that the bidder is affiliated with the previous successful bidder, the ACMA must tell the bidder that the ACMA does not consider it to be affiliated with the previous successful bidder.

PART 7 PROCEDURES AFTER AUCTION

Division 1 Simplified outline

Section 65 Simplified outline of this Part

This section sets out a simplified outline of Part 7.

Division 2 Application of this Part

Section 66 This Part applies if an auction is conducted

Part 7 applies only if an auction is conducted under Part 6.

Division 3 Confirmation of auction results

Section 67 Notice and refunds to unsuccessful bidders and withdrawn applicants

This section sets out the procedure that the ACMA must follow in relation to unsuccessful bidders or withdrawn applicants. Unsuccessful bidders will be notified as soon as practicable after the auction period that they have not won any spectrum and that their confidentiality obligations under section 17 have ended. The ACMA must refund any deposit made by an unsuccessful bidder, within a maximum period of 6 months after notifying the bidder that they are unsuccessful, unless the ACMA has decided to retain the deposit under section 85 due to a breach of the Determination.

Similarly for withdrawn applicants, as soon as practicable after the end of the auction period, the ACMA must notify each applicant that withdrew, or was taken to have withdrawn, its application that the applicant's confidentiality obligations under section 17 have ended. Subject to sections 85 and 88, the ACMA is obliged under section 39 to refund any deposit paid to a withdrawn applicant.

Section 68 Winning bidder to make statement about affiliations

Under this section, the ACMA is required to give each winning bidder details of the identity 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 or with a previous successful bidder and, if so, to provide details of that affiliation. The ACMA will not issue a spectrum licence to a winning bidder unless and 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 10 working days after the date of the request. Giving false or misleading information to the ACMA may constitute a serious offence under the *Criminal Code*.

The purpose 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 in the Residual 700 MHz Spectrum Direction.

Section 69 Notification that winning bidders are affiliated, or winning bidder is affiliated with previous successful bidder

This section provides that the ACMA must notify the winning bidders if it is satisfied that 2 winning bidders became affiliated after (but not during) the auction period. This notification will provide details of the basis on which that decision has been made. If the ACMA is satisfied that a winning bidder is affiliated with a previous successful bidder who is not also a winning bidder, the ACMA must notify the winning bidder in writing and tell the bidder the basis on which the ACMA is satisfied that the bidder and the previous successful bidder are affiliated.

Section 70 Consequences of affiliation between 2 winning bidders

The allocation limits may affect the allocation of spectrum licences to winning bidders who have been notified that the ACMA is satisfied that they became affiliated after the auction period (**affiliated winning bidders**). The ACMA must not issue spectrum licences to the affiliated winning bidders that would exceed the allocation limits. Where the number of lots won by the affiliated winning bidders exceeds these allocation limits, when the lot size of those lots is aggregated with a part of the spectrum that either or both the affiliated winning bidders, or the specified group of persons that includes the affiliated winning bidders, may use as a result of the allocation of spectrum licences under the previous allocation Determination, this section applies.

If one of the winning bidders is also a previous successful bidder, any spectrum licences allocated under the previous allocation Determination to the previous successful bidder are relevant to an assessment whether issuing spectrum licences to the winning bidders would exceed the allocation limits. In this case, subsection 70(1) provides that new spectrum licences must only be issued in accordance with section 70. If the two winning bidders are also affiliated with a previous successful bidder who is not a winning bidder, then any spectrum licences in the 700 MHz band allocated to that previous successful bidder under the previous allocation Determination are relevant to an assessment whether issuing spectrum licences to the winning bidders would exceed the allocation limits, and subsection 70(2) provides that new spectrum licences must only be issued in accordance with section 70.

Subject to subsection (9), subsection (3) provides that, if the issue of spectrum licences to the affiliated winning bidders for both the 10 MHz lot and the 5 MHz lot would exceed the allocation limits, the bidders may give a direction to the ACMA. This direction may be either:

- (a) if the ACMA issuing a spectrum licence for only the 10 MHz lot to either of the affiliated winning bidders would exceed the allocation limits – which of the bidders is to be issued a spectrum licence for the 5 MHz lot; or
- (b) in any other case – which of the bidders is to be issued a spectrum licence for the 10 MHz lot.

That is, if a spectrum licence for the 10 MHz lot may be issued to either affiliated winning bidder without exceeding the allocation limits, the affiliated winning bidders can direct the ACMA as to which one of them receives a spectrum licence for the 10 MHz lot, and the 5 MHz lot remains unallocated. However, if issuing a licence for the 10 MHz lot to either affiliated winning bidder would exceed the allocation limits, the winning bidders can direct the ACMA as to which of them receives a spectrum licence for the 5 MHz lot, and the 10 MHz lot remains unallocated.

Subsection (9) provides that if issuing a spectrum licence for the 5 MHz lot to either affiliated winning bidder would exceed the allocation limits, both lots remain unallocated and no spectrum licences must be issued.

The direction given under subsection (3) must be given jointly by the affiliated winning bidders and must be given to the ACMA within five working days after the bidders receive notification under subsection 69(1). Subject to the Act and the Determination, the ACMA must issue a spectrum licence in accordance with that direction, and must not issue a spectrum licence for the other lot to either of the affiliated winning bidders.

Under subsection (6), and again subject to subsection (9), if the ACMA does not receive a direction within 5 working days, the ACMA may choose at its discretion either:

- (a) if issuing a spectrum licence for only the 10 MHz lot to either of the affiliated winning bidders would exceed the allocation limits – which of those bidders is to be issued a spectrum licence for the 5 MHz lot; or
- (b) in any other case – which of those bidders is to be issued a spectrum licence for the 10 MHz lot.

The ACMA must give written notice to the affiliated winning bidders of its decision under subsection (6). Subject to the Act and the Determination, the ACMA must issue a spectrum licence in accordance with its decision under subsection (6), and must not issue a spectrum licence for the other lot to either of the affiliated winning bidders.

As mentioned, under subsection (9), if issuing a spectrum licence for the 5 MHz lot to either of the affiliated winning bidders would exceed the allocation limits, the ACMA must not issue any spectrum licences to those bidders. If issuing a spectrum licence for the 5 MHz lot would exceed the allocation limit for either bidder, then issuing a spectrum licence for either the 10 MHz lot, or both the 5MHz lot and 10 MHz lot, would exceed the allocation limits.

If the ACMA must not issue a spectrum licence for a lot to a bidder under section 70, section 80 applies to that lot.

Section 71 Consequences of affiliation with previous successful bidder

The allocation of spectrum licences under the Determination to a winning bidder affiliated with a previous successful bidder remains subject to the allocation limits. If:

- (a) the ACMA notifies a winning bidder under subsection 69(2) that it is satisfied the bidder is affiliated with a previous successful bidder; and
- (b) the previous successful bidder is not also a winning bidder; and
- (c) the lot size of the lots won by the winning bidder, when aggregated with the part of the spectrum that the previous successful bidder, or the specified group of persons that includes the previous successful bidder, may use as a result of the allocation of spectrum licences under the previous allocation Determination, would exceed the allocation limits;

subsection (1) provides that the ACMA must not issue spectrum licences to the winning bidder that would exceed the allocation limits, and must not issue spectrum licences to the winning bidder except in accordance with section 71.

Under subsection (2) if:

- (a) the winning bidder won both the 10 MHz lot and the 5 MHz lot; and
- (b) issuing a spectrum licence for only the 10 MHz lot to the bidder would not exceed the allocation limits;

the bidder may give a direction to the ACMA specifying either:

- (c) that the bidder wishes to be issued a spectrum licence for the 10 MHz lot; or
- (d) that the bidder wishes to be issued a spectrum licence for the 5 MHz lot.

The direction must be given by the winning bidder to the ACMA within five working days after the winning bidder receives notification under subsection 69(2). Subject to the Act and the Determination, the ACMA must issue a spectrum licence in accordance with that direction, and must not issue a spectrum licence for the other lot to the bidder. If the ACMA does not receive a direction within five working days, subject to the Act and the Determination, the ACMA must issue a spectrum licence for the 10 MHz lot to the bidder.

If the winning bidder won both the 10 MHz lot and the 5 MHz lot; and issuing a spectrum licence for only the 10 MHz lot to the bidder would exceed the allocation limits, then the ACMA must not issue a spectrum licence for the 10 MHz lot to the bidder. Subject to the Act and the Determination, the ACMA must issue a spectrum licence for the 5 MHz lot to the bidder.

If the winning bidder won only the 10 MHz lot and issuing a spectrum licence for only the 10 MHz lot to the bidder would exceed the spectrum allocation limits, then the ACMA must not issue a spectrum licence for the 10 MHz lot to that bidder.

If issuing a spectrum licence for the 5 MHz lot to the winning bidder would exceed the allocation limits, the ACMA must not issue a spectrum licence for the 10 MHz lot, or the 5 MHz lot, or both lots, to that bidder. If issuing a spectrum licence for the 5 MHz lot to the bidder would exceed the allocation limits, then issuing a spectrum licence for the 10 MHz lot, or for both the 5 MHz and 10 MHz lots, would exceed the allocation limits.

If the ACMA must not issue a spectrum licence for a lot to a bidder under section 71, section 80 applies to that lot.

Division 4 Payment and issue of spectrum licences

Section 72 The winning price for a lot

If there is only one bid on the lot, the **winning price** for a lot won by a bidder at auction is the starting price for the lot. If there is more than one bid on the lot, the **winning price** for a lot won by a bidder at auction is the highest bid made for the lot by any bidder, during any round, other than the **final high bid**. The final high bid is defined in Schedule 1 to the Determination.

Section 73 The upfront winning price and the delayed winning price

Under section 75, and in accordance with the Residual 700 MHz Spectrum Direction, a winning bidder can elect either to pay the balance of the upfront winning price no later than 31 January 2018 or to pay the delayed winning price by instalments as outlined in subsection 75(3). This section defines the terms used in calculating payment of the upfront winning price, the balance of the upfront winning price and delayed winning price. As mentioned above, the Residual 700 MHz Spectrum Direction requires the ACMA to allow successful applicant to pay the spectrum access charge in three instalments, subject to certain conditions being met. One of those conditions is that the present value of the instalment payments must total the amount determined in accordance with the allocation process. Under this Part, the amount determined in accordance with the allocation process for a spectrum licence is the sum of the winning prices for the lots to be included in that licence.

The **upfront winning price** for a winning bidder is the sum of the winning prices for the lots won by the bidder at auction. If a winning bidder chooses to pay the entire spectrum access charge up front, the upfront winning price is the spectrum access charge for the spectrum licence to be issued to the winning bidder.

The **balance of the upfront winning price** for a winning bidder is the upfront winning price less the amount of any deposit paid by the winning bidder.

The **delayed winning price** for a winning bidder is the sum of:

- (a) the deposit paid by the winning bidder for the licence under section 38 (if any);
- (b) the first auction instalment for the winning bidder;
- (c) the second auction instalment for the winning bidder; and
- (d) the third auction instalment for the winning bidder.

The first, second and third auction instalments to be paid in relation to a spectrum licence are calculated by reference to the winning prices for the lots to be included in the licence (see section 75).

The sum of the present value of each of the instalments, and of the deposit (if any), is the same as the sum of the winning prices for the lots to be included in the licence, when calculated in accordance with

the Residual 700 MHz Spectrum Direction. See below for further discussion on the calculation of the auction instalments.

Section 74 Sufficient deposit—issue of spectrum licence without further payment

This section provides for refunds and the entitlement to be issued spectrum licences where the balance of the upfront winning price as worked out under section 73 is equal to or less than zero.

If the balance of the upfront winning price is less than zero, the ACMA must refund that part of the deposit that is in excess of the total of the upfront winning price for lots won by the winning bidder. 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 zero, the bidder is entitled to be issued a spectrum licence for each part of the spectrum allocated to the bidder without further payment.

Section 75 Payment of balance of winning price

This section sets out the arrangements for notifying winning bidders of the balance of the upfront winning price, where that amount is greater than zero (i.e., it is more than the bidder's deposit), and of the delayed winning price. It also sets out the timing by which the balance of the upfront winning price or the delayed winning price must be paid.

If the balance of the upfront winning price that has been calculated under section 73 is greater than zero, the ACMA must notify each winning bidder by registered mail of the balance of the upfront winning price, the delayed winning price, the dates on which the three auction instalments for the delayed winning price must be paid, the amounts of those instalments (including the effect of the deposit (if any) paid under section 38 on the first auction instalment), and the date, not earlier than 10 working days after the date of the notice, by which the bidder must give the ACMA written notice whether it elects to pay either:

- (a) the balance of the upfront winning price; or
- (b) the delayed winning price.

If a winning bidder gives the ACMA written notice that it elects to pay the balance of the upfront winning price by the date specified in the notice given by the ACMA:

- (a) the ACMA must notify the winning bidder by registered mail that the ACMA has received the bidder's election; and
- (b) the balance of the upfront winning price must be paid by the winning bidder to the ACMA on behalf of the Commonwealth no later than 31 January 2018.

If a winning bidder gives the ACMA written notice that it elects to pay the delayed winning price by the date specified in the notice given by the ACMA, the ACMA must notify the winning bidder by registered mail that the ACMA has received the bidder's election, and the delayed winning price must be paid by the winning bidder to the ACMA on behalf of the Commonwealth in accordance with the following schedule:

- (a) an instalment of:
 - (i) 48.0051 per cent of the gross auction price for the licence; less

- (ii) the deposit (if any) paid by the applicant under section 38;
(the **first auction instalment** for the licence) must be paid no later than 31 January 2018;
- (b) an instalment of 26.6315 per cent of the gross auction price for the licence, multiplied by 1.05 (the **second auction instalment** for the licence) must be paid no later than 31 January 2019;
and
- (c) an instalment of 25.3634 per cent of the gross auction price for the licence, multiplied by 1.1025 (the **third auction instalment** for the licence) must be paid no later than 31 January 2020.

For the purposes of calculating the auction instalments, the **gross auction price** for a licence is the sum of the winning prices for each of the lots to be included in the licence.

In announcing his intention to direct the ACMA to conduct an auction in October 2016, the Minister wrote to the ACMA, indicating that he was considering directing the ACMA to allow successful bidders to pay the auction winning-bid price ‘in a manner consistent with the payment arrangement outlined in the draft ministerial direction to the ACMA on VHA’s March 2016 proposal’ (see the Minister’s letter to the Acting Chair of the ACMA, available on the ACMA’s webpage for [consultation](#) on the Determination). The reference to ‘VHA’s March 2016 proposal’ is a reference to a proposal put forward by Vodafone Hutchison Australia, on which the Department of Communications and the Arts publicly consulted between 6 May and 10 June 2016. The ACMA consulted on the basis that the auction instalment percentages would be the same as those in that proposal.

The percentages in the Determination for the auction instalment payments vary slightly from those included in VHA’s March 2016 proposal. The ACMA has sought to keep close to those percentages, while complying with the requirement in the Residual 700 MHz Spectrum Direction to ensure that the present value of the total spectrum access charge payable (that is, the delayed winning price) be the same (when rounded to the nearest \$1,000) as the amount determined in accordance with the allocation procedures (that is, the sum of the winning prices for the lots included in the relevant spectrum licence). The Residual 700 MHz Spectrum Direction requires that the ‘present value of the total spectrum access charges’ be calculated as the sum of the present values of the instalments. For this purpose, the ACMA treats the deposit as being paid at the same time as the first auction instalment.

The winning bidder paying the delayed winning price must also give the ACMA an irrevocable bank guarantee securing the payment of the second auction instalment and the third auction instalment, issued by an Australian-owned authorised deposit-taking institution (as defined in the *Banking Act 1959*) which is a bank, in a form approved by the ACMA (**delayed winning price bank guarantee**), no later than 31 January 2018 (that is, the date by which the first auction instalment must be paid). The winning bidder is not entitled to be issued a spectrum licence unless it gives the ACMA the delayed winning price bank guarantee securing the ‘secured auction amount’. In accordance with the Residual 700 MHz Spectrum Direction, the **secured auction amount** is five per cent of the amount of spectrum access charge that remains unpaid (that is, five per cent of the second and third auction instalments, reducing to five per cent of the third auction instalment after the second auction instalment is paid).

Each instalment must be paid in accordance with the payment arrangements that are outlined in section 7.

If the ACMA becomes aware that a notice given to a winning bidder under subsection (1) (i.e., the notice setting out the balance of the upfront winning price and the delayed winning price, among other things) contains a material error, the ACMA must give the winning bidder a revised notice by registered mail (subsection (4)). If a revised notice is given under subsection (4):

- (a) the ACMA must include in the revised notice a date, not later than 15 working days after the date of the revised notice, by which the bidder may give the ACMA notice whether it has elected to pay the balance of the upfront winning price or the delayed winning price; and
- (b) subsections 75(2) and 75(3) apply as if the date for making the election as to upfront or delayed payment were the date included in the revised notice; and
- (c) any previous notice given by the winning bidder under subsection 75(2) or 75(3) is of no effect.

If a winning bidder does not give the ACMA written notice whether it elects to pay the balance of the upfront winning price or the delayed winning price by the date specified in the original notice given by the ACMA (or in any revised notice), the bidder is deemed to have given the ACMA written notice that it elects to pay the balance of the upfront winning price under subsection (2) (that is, the upfront option).

If a winning bidder gives the ACMA written notice that it elects to pay the delayed winning price by the date specified in the original notice given by the ACMA (or in any revised notice), the winning bidder is not entitled to be issued a spectrum licence unless the winning bidder has also given the ACMA a delayed winning price bank guarantee, no later than 31 January 2018, as mentioned above.

If the winning bidder fails to pay an instalment other than the first auction instalment in accordance with subsection (3), the winning bidder may be in breach of the licence condition required to be included in a spectrum licence by section 67 of the Act, and the ACMA or the Commonwealth may require the authorised deposit-taking institution that has issued the delayed winning price bank guarantee to pay the amounts secured by that bank guarantee. Nothing in the Determination limits the other rights or remedies the ACMA or the Commonwealth has against a person, including against the authorised deposit-taking institution that has issued the delayed winning price bank guarantee.

If a spectrum licence is issued to a winning bidder in accordance with subsection 76(2), each of the first auction instalment, the second auction instalment and the third auction instalment is not refundable in any circumstances.

If a delayed winning price bank guarantee is given to the ACMA by email or fax before the date mentioned in subsection 75(7), the original guarantee must be received by the ACMA no later than three working days after that date (or, if the ACMA agrees to a later time, the agreed time) for the guarantee to be taken to have been given to the ACMA.

Section 76 Issue of spectrum licence

If a winning bidder elects to pay the balance of the upfront winning price, and pays the balance of the upfront winning price in accordance with subsection 75(2), the winning bidder is entitled to be issued a spectrum licence for each part of the spectrum allocated to the bidder.

If a winning bidder elects to pay the delayed winning price and pays the first auction instalment in accordance with subparagraph 75(3)(b)(i) and gives the ACMA the delayed winning price bank guarantee in accordance with subsection 75(7), the winning bidder is entitled to be issued a spectrum licence for each part of the spectrum allocated to the bidder.

Section 77 Default

This section sets out the consequences that apply if a winning bidder elects to pay the balance of the upfront winning price and does not pay the balance of the upfront winning price in accordance with subsection 75(2). In this case, the spectrum licence is not allocated to the winning bidder, the allocation of spectrum licences under the Determination to other applicants is not affected, and section 80 applies to spectrum that, but for section 77, would have been included in a spectrum licence allocated to the winning bidder.

Section 77 also sets out the consequences that apply if a winning bidder elects to pay the delayed winning price; and either, or both:

- (a) does not pay the first auction instalment in accordance with subparagraph 75(3)(b)(i); or
- (b) does not give the ACMA the delayed winning price bank guarantee in accordance with subsection 75(7).

In this case, the spectrum licence is not allocated to the winning bidder, the allocation of spectrum licences under the Determination to other applicants is not affected, and section 80 applies to spectrum that, but for this section, would have been included in a spectrum licence allocated to the winning bidder.

If the applicant fails to pay an instalment other than the first auction instalment, the applicant may be in breach of the licence condition required to be included in a spectrum licence by section 67 of the Act, and the ACMA or the Commonwealth may require the authorised deposit-taking institution that has issued the delayed winning price bank guarantee to pay the amount secured by that bank guarantee. Nothing in the Determination limits the other rights or remedies the ACMA or the Commonwealth has against a person, including against the authorised deposit-taking institution that has issued the delayed winning price bank guarantee.

Section 78 Publication of auction results

The ACMA will release the auction 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 winning bidders, the spectrum allocated to each winning bidder, and the winning price for each lot won by each winning bidder.

PART 8 MISCELLANEOUS

Section 79 Simplified outline of this Part

This section sets out a simplified outline of Part 8.

Section 80 Unallocated spectrum

There may be circumstances in which spectrum lots offered at auction are not allocated. For example, unallocated lots could arise where there is no person who nominates a lot as its preferred lot, or where a winning bidder does not pay the balance of the upfront winning price, in accordance with section 77, or where the ACMA is satisfied that two or more winning bidders are affiliated and the spectrum won at auction by the affiliated winning bidders would exceed 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.

Section 81 Bidders must not misuse auction system

This section provides that a bidder must only access and use the auction system in accordance with the information provided by the ACMA under section 53, 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 82 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, or considering whether two applicants are affiliated.

If the ACMA has reason to believe that an applicant or bidder has information or documents that are relevant to the performance of any of the ACMA's functions or the exercise of its powers under the Determination, the ACMA may, by written notice, require the applicant or bidder to give to the ACMA, within the period and in the manner and form specified in the notice, any such information or to produce to the ACMA, within the period and in the manner specified in the notice, any such documents.

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 this section is breached, including failure to provide available information or documentation when requested, the ACMA may take action under section 85 of the Determination.

The ACMA may vary the notice.

Section 83 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 for the purposes of the Determination, including disclosing or publishing information or documents as provided for 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 its 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 ACMA Act, or as otherwise authorised by law.

Section 84 ACMA to provide information to ACCC on request

In line with subsection 60(7) of the Act, section 84 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 the procedures in Parts 5 and 7.

Section 85 Retention of deposit 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, on behalf of the

Commonwealth, retain a deposit paid, or enforce a deed of financial security given, by an applicant or bidder 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 retain the deposit or enforce the deed of financial security if a successful applicant failed to pay the balance of the upfront pre-determined price as required under subsection 45(2), failed to pay the first instalment as required under paragraph 46(2)(a), or failed to give the ACMA the delayed pre-determined price bank guarantee in accordance with subsection 44(6).

The ACMA may also retain the deposit or enforce the deed of financial security if the ACMA is satisfied that the bidder breached section 61 (that is, the bidder was affiliated with another bidder during the auction period), or the bidder is a winning bidder who failed to give the statement required under section 68 about affiliations with other bidders and previous successful bidders.

The ACMA may also retain the deposit or enforce the deed of financial security if a winning bidder failed to pay the balance of the upfront winning price as required under paragraph 75(2)(b), failed to pay the first auction instalment as required under subparagraph 75(3)(b)(i), or failed to give the ACMA the delayed winning price bank guarantee in accordance with subsection 75(7).

The ACMA may also retain the deposit or enforce the deed of financial security if the ACMA is satisfied that the applicant or bidder, or a related person of the applicant or bidder, breached the confidentiality obligations under section 17 after the end of the auction period (but before the confidentiality obligations came to an end), or the applicant or bidder failed to comply with a requirement in a notice given under subsection 82(1), requiring the production of information or documents.

The ACMA must notify the applicant or bidder, in writing, of a decision under subsection 85(1) and the nature of the breach or failure, before the later of:

- (a) six months after:
 - (i) if notice was given to the applicant under subsection 45(1) or 46(1) (pre-determined price payments) – the day the notice was given; or
 - (ii) in any other case – the end of the auction period; and
- (b) six months after the day on which the breach or failure mentioned in subsection 85(1) occurred.

Any amount retained or obtained by the ACMA under section 85 is forfeited to the Commonwealth unless the Federal Court orders its return under section 88.

Section 86 Effect of retention on allocation to applicants for pre-determined price

This section provides that, if the ACMA makes a decision under subsection 85(1) in relation to an applicant notified under subsection 45(1) or 46(1) the ACMA must not issue a spectrum licence to the applicant, and section 80 applies in a spectrum licence allocated to the winning bidder. This section takes precedence over subsections 44(4) and 44(5), which otherwise would require the ACMA to issue a licence to the applicant.

Section 87 Effect of retention on winning bidders

This section provides that, if the ACMA makes a decision under subsection 85(1) in relation to a winning bidder, the ACMA must not issue a spectrum licence to the winning bidder; and section 80

applies to spectrum that, but for section 87, would have been included in a spectrum licence allocated to the winning bidder. Section 87 takes precedence over subsections 70(5), 70(8), 71(4), 71(5) and 71(6), and sections 74 and 76, which otherwise would require the ACMA to issue a licence to the winning bidder.

Section 88 Application to Federal Court for return of retained amount

This section provides that, where an applicant or bidder is notified by the ACMA of its decision to retain a deposit or enforce a deed of financial security, the applicant may, within one year of receiving the notice, apply to the Federal Court for return of all or part of a deposit or an amount secured by a deed of financial security.

On application, the Court may:

- (a) if the Court is not satisfied that the applicant or bidder committed the breach or failure identified in the notice given by the ACMA – order the return of all the amount retained by the ACMA; or
- (b) if the Court is satisfied that the applicant or bidder committed the breach or failure, but considers that it would be disproportionate for the full amount to be retained – order the return of part of the amount retained by the ACMA.

This section does not enable the Federal Court to order that a spectrum licence be issued to an applicant or bidder. This section also does not remove any existing jurisdiction of a court.

Section 89 Liability of ACMA, auction manager and the Commonwealth

This section provides that neither 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 90 Other rights not affected

This section provides that the Determination does not limit any right of action or remedy that the ACMA or the Commonwealth has against any person. In particular, it does not limit the right of action or remedy the ACMA or the Commonwealth may have in relation to a deed of acknowledgment, deed of financial security, deed of confidentiality or bank guarantee given under the Determination, or in relation to any failure to pay any instalments payable under the Determination, or to enforce any licence condition of a licence issued pursuant to the Determination.

Section 91 Auction manager may delegate functions and powers

This section provides that the auction manager may delegate any of their functions and powers under the Determination.

SCHEDULE 1 AUCTION RULES

This Schedule describes the detailed rules for conducting the auction, and operates in conjunction with related procedures that are referred to in Part 6 of the Determination. It also defines some terms that are relevant both to the Schedule and other Parts of the Determination (such as Part 7, and the calculation of the spectrum access charge).

Part 1 Auction arrangements

Clause 1 Schedule for rounds of the auction

The SCA methodology for the auction requires a series of rounds to be held, during which bidders may place a bid on a lot in accordance with this Schedule. This clause provides for the scheduling of rounds of the auction, and the rules that such a schedule must meet. Rounds must only occur on a working day (as defined in subsection 4(1)) other than a recess day, and will start and finish between 9 am and 5 pm. The scheduling of the rounds between those times is at the auction manager's discretion, subject to paragraph 2(3)(a) of the Schedule. There is no minimum or maximum duration for each round, nor for the interval between rounds. There is no upper or lower limit on 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 one hour before the first round of the day, subject to section 58, which deals with the notice to be given of the first and second rounds of the auction. This clause also allows the auction manager to alter the schedule of rounds. However, if this occurs, the auction manager must inform bidders of the change as soon as practicable.

Clause 2 Rounds of the auction

This clause provides that each round will be for bids on a single lot. In accordance with the Residual 700 MHz Spectrum Direction, the first round will be for bids on the 10 MHz lot. Each subsequent round will be for bids on the 10 MHz lot until there is a final round for bids on the 10 MHz lot (see below for how to assess which round is the final rounds for bids on the 10 MHz lot). After the final round for bids on the 10 MHz lot (at which point the ACMA will know the identity of the winning bidder for the 10 MHz lot), there must be at least one recess day before the next round of the auction, which will be the opening round for bids on the 5 MHz lot.

A bidder may only make a bid on a lot if it is one of the bidder's preferred lots, as set out in its preference nomination form (as affected by operation of the allocation limits, as discussed above).

Clause 2 also requires the auction manager to provide specific information to bidders before, and after, rounds, which may be used by bidders in assessing whether to make a bid in a round. Before the start time of each round for bids on the 10 MHz lot, the auction manager must use the auction system to provide to each bidder who nominated the 10 MHz lot as a preferred lot the following information:

- > the start time of the round;
- > the end time of the round;
- > the specified price that will apply to the 10 MHz lot in the round;

- > for each round other than the first round, the specified price that applied to the 10 MHz lot in the previous round;
- > the total number of bidders that have nominated the 10 MHz lot as a preferred lot;
- > the number of bidders remaining in the auction for the 10 MHz lot after the end of the previous round; and
- > any other information the ACMA considers necessary or convenient to conduct the auction.

During a round, no bidder will know the amount of any other bidder's bid, or whether any other bidder has made a bid.

After each round for bids on the 10 MHz lot, the auction manager must use the auction system to provide to each bidder who nominated the 10 MHz lot as a preferred lot the following information:

- > the bid made by the bidder during the round (if any);
- > for each round other than the final round for the 10 MHz lot– the number of bidders remaining in the auction for the lot after the round;
- > if, as a result of the round, the bidder is the winning bidder for the 10 MHz lot – the winning price for that lot; and
- > any other information the ACMA considers necessary or convenient to conduct the auction.

Before the start time of each round for bids on the 5 MHz lot, the auction manager must use the auction system to provide to each bidder who nominated the 5 MHz lot as a preferred lot the following information:

- > the start time of the round;
- > the end time of the round;
- > the specified price that will apply to the 5 MHz lot in the round;
- > for each round other than the first round, the specified price that applied to the 5 MHz lot in the previous round;
- > the total number of bidders that have nominated the 5 MHz lot as a preferred lot;
- > the number of bidders remaining in the auction for the 5 MHz lot after the end of the previous round; and
- > any other information the ACMA considers necessary or convenient to conduct the auction.

During a round, no bidder will know the amount of any other bidder's bid, or whether any other bidder has made a bid.

After each round for bids on the 5 MHz lot, the auction manager must use the auction system to provide to each bidder who nominated the 5 MHz lot as a preferred lot the following information:

- > the bid made by the bidder during the round (if any);
- > for each round other than the final round for the 5 MHz lot– the number of bidders remaining in the auction for the lot after the round;
- > if, as a result of the round, the bidder is the winning bidder for the 5 MHz lot – the winning price for that lot; and

- > any other information the ACMA considers necessary or convenient to conduct the auction.

Clause 3 Recess days

This clause provides 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, other than the recess day(s) mentioned in paragraph 2(3)(a) of the Schedule, the auction manager 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 the auction manager must inform all bidders of this decision.

Part 2 Bidding in the auction

Clause 4 When bidder cannot make a bid on a lot

The nature of the SCA methodology adopted by the ACMA is such that bidders can make a continue bid or an exit bid. As mentioned above, a continue bid in a round is a bid equal to or greater than the specified price for the lot for the round. The specified price for a lot for a round is the sum of the specified price for the lot for the previous round (or the starting price, where the round is the first round) plus the specified price for the previous round multiplied by the bid increment percentage. An exit bid in a round is a bid equal to or greater than the specified price for the lot for the previous round, but less than the specified price for the lot in that round.

For example, consider a lot with starting price of \$100, and a bid increment percentage of 10%.

<i>Round</i>	<i>Specified price for the previous round, or starting price for the first round</i>	<i>Specified price for the round</i>	<i>Exit bid for the round</i>	<i>Continue bid for the round</i>
1	\$100	$\$100 + 10\% \text{ of } \$100 = \$110$	Equal to or greater than \$100, but less than \$110	Equal to or greater than \$110
2	\$110	$\$110 + 10\% \text{ of } \$110 = \$121$	Equal to or greater than \$110, but less than \$121	Equal to or greater than \$121
3	\$121	$\$121 + 10\% \text{ of } \$121 = \$133.10$	Equal to or greater than \$121, but less than \$133.10	Equal to or greater than \$133.10

Note that specified prices in the auction will be rounded up to the next thousand, and bids in the auction may only be in multiples of \$1000 (see clauses 5 and 9).

Any bid above the specified price for a round is a continue bid at an advance price.

Clause 4 of Schedule 1 provides that if, in a round, either a bidder does not make a bid on the relevant lot; or a bidder is an exit bidder in the circumstances set out in clause 10 (that is, the bidder has made an exit bid), the bidder cannot make a bid on the relevant lot in any subsequent round for bids on that lot in the auction. That is, if a bidder fails to make a bid on a lot in a round, or the bidder makes an exit bid on a lot in a round, the bidder may not make any further bids on that particular lot.

An exit bid may have been a continue bid in a previous round of the auction, in accordance with clause 8.

In deciding whether a bidder has made a bid on a lot in a round, clause 8 might provide that a bidder is taken to make a bid in certain circumstances (see below).

An exit bid made by the bidder may still be the final high bid for the relevant lot, and in that case the bidder would be the winning bidder for the lot (see below).

Clause 4 also provides for another circumstance in which a bidder is not permitted to make a bid. If the bidder nominated both the 10 MHz lot and the 5 MHz lot as its preferred lots, and is the winning bidder for the 10 MHz lot, the winning bidder is not permitted to make a bid on the 5 MHz lot if winning both lots would cause the bidder to be allocated spectrum that exceeds the allocation limits. Put another way, a bidder can nominate both lots, even if winning both lots would exceed the allocation limits, but will not be allowed to bid on the 5 MHz lot if it wins the 10 MHz lot.

Clause 5 Starting price and specified price

This clause provides that a bid below the starting price on a lot will not be accepted.

This clause also provides for how the **specified price** for each lot is to be calculated. As mentioned above, the specified price for a lot in a round is the sum of the specified price for the lot for the previous round (or the starting price, where the round is the first round) plus the specified price for the previous round multiplied by the bid increment percentage, rounded up to the next thousand.

Clause 6 Changing bid increment percentage to vary specified prices

This clause provides that the auction manager may, at any time during the auction, change the bid increment percentage fixed under section 36 of the Determination, to vary the specified price on a lot in future rounds. During the auction, the auction manager may vary these amounts after consulting with bidders. Adjusting the level of these bid increments may be used to influence the speed at which the auction progresses.

Before making any change, 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 one 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 7 General rules about bidding

A bidder may bid on either or both lots, subject to bidding only on the lots the bidder nominated in its preference nomination form, and subject to whether the bidder has made an exit bid on a lot (which, as mentioned above, would prevent the bidder from making any future bids on the lot). As mentioned above, certain bidders may be prevented from bidding on the 5 MHz lot if they have won the 10 MHz lot.

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, subject to subsection 59(1) (which allows the auction manager to accept bids by a method other than the auction system).

A bidder may change, delete or replace a bid in the auction system as often as desired during a round. The bid that will be treated as binding for a bidder is the bid in the auction system at the end time of a round. A bidder is taken to make a bid in the circumstances specified in clause 8.

Clause 8 Continue bid made at greater than specified price

As mentioned above, bidders are allowed to bid above the specified price for the lot in a round. A bidder may make a continue bid on a lot in a round of the auction (**the relevant round**) that is for an amount (**the advance price**) that is equal to or greater than the specified price for the lot in the relevant round. This continue bid will constitute, in any round after the relevant round where the advance price is greater than or equal to the specified price for the lot in that round, a continue bid made on that lot in that round. This continue bid will also, in the first round after the relevant round in which the advance price is less than the specified price for the lot in that round, constitute an exit bid made on that lot in that round.

For example, consider a lot with starting price of \$100, and a bid increment percentage of 10%. In the first round, a bidder makes a bid of \$125 (**advance bid**).

<i>Round</i>	<i>Specified price for the previous round, or starting price for the first round</i>	<i>Specified price for the round</i>	<i>An advance bid in the first round of \$125 is taken to be...</i>
1	\$100	\$110	A continue bid, being greater than \$110
2	\$110	\$121	A continue bid, being greater than \$121
3	\$121	\$133.10	An exit bid, being greater than \$121 but less than \$133.10.

Note that specified prices in the auction will be rounded up to the next thousand, and bids in the auction may only be in multiples of \$1000 (see clauses 5 and 9).

However, a bidder may, in any subsequent round after making the advance bid, make a contrary bid that takes the place of the bid deemed to be made.

Clause 9 Validity of bids

This clause prescribes the requirements for a bid to be valid. A bid in a round is valid if for the first round for either the 10 MHz lot or 5 MHz lot the bid is not less than the starting price for the relevant lot. For rounds other than the first round, for either the 5MHz lot or 10 MHz lot, the bid is valid if it is not less than the specified price of the relevant lot for the previous round (that is, the bid must be either an exit bid or a continue bid). A bid for a round must be received by the auction system between the start time and end time of the bidding period for the round (subject to section 59 of the Determination). A bid must be a multiple of one thousand.

Clause 10 Exit bids – exclusion from further participation

If, in a round, a bidder makes an exit bid for a lot (**the exit bidder**) and two or more bidders make a continue bid for the lot, the exit bidder cannot make any bid on the lot in any subsequent round. This applies even if another bidder makes an exit bid on the lot in the same round.

Part 3 Determining the winning bidder for a lot

Clause 11 Final round for bids on the 10 MHz lot and final round of the auction

This section sets out the rules for determining when bidding on a lot ends, the identity of the winning bidder and the final high bid.

The final round for bids on the 10 MHz lot is the first round where there is one bid made for the 10 MHz lot, or one or more exit bids, and no more than one continue bid, are made for the 10 MHz lot, or no bids are made for the 10 MHz lot. If two or more continue bids are made for the 10 MHz lot during a round, there will be at least one further round.

The round after the final round for bids on the 10 MHz lot is the first round for bids on the 5 MHz lot.

The final round of the auction is the first round where one bid is made for the 5 MHz lot, or one or more exit bids, and no more than one continue bid, are made for the 5 MHz lot, or no bids are made for the 5 MHz lot. If two or more continue bids are made for the 5 MHz lot during a round, there will be at least one further round.

The final high bid for the 10 MHz lot is whichever of the following applies:

- (a) if one bid was made on the lot in the final round for the lot – that bid; or
- (b) if one continue bid was made on the lot in the final round for the lot – that continue bid; or
- (c) if each of the following applies:
 - (i) no continue bid was made on the lot in the final round for bids on the lot; and
 - (ii) two or more exit bids were made on the lot in the final round for the lot; and
 - (iii) one of those exit bids (**the high exit bid**) was greater than each of the other exit bids;
– the high exit bid.

That is, generally speaking, the highest bid made on the lot will be the final high bid for the lot. However, in the circumstance where no continue bid is made on the lot in the final round and there are two or more exit bids that are equal, the final high bid for the 10 MHz lot is worked out in accordance with clause 12.

The final high bid for the 5 MHz lot is whichever of the following applies:

- (a) if one bid was made on the lot in the final round for the lot – that bid; or
- (b) if one continue bid was made on the lot in the final round for the lot – that continue bid; or
- (c) if each of the following applies:
 - (i) no continue bid was made on the lot in the final round for bids on the lot; and
 - (ii) two or more exit bids were made on the lot in the final round for the lot; and
 - (iii) one of those exit bids (**the high exit bid**) was greater than each of the other exit bids;
– the high exit bid.

That is, generally speaking, the highest bid made on the lot will be the final high bid for the lot. However, in the circumstance where no continue bid is made on the lot in the final round and there are two or more exit bids that are equal, the final high bid for the 5 MHz lot is worked out in accordance with clause 13.

An exit bid may have been a continue bid in a previous round of the auction, in accordance with clause 8.

Subject to subclauses 12 (2) and 13(2), the bidder who made the final high bid for a lot is the winning bidder for that lot. However if there is no bid by any bidder in the first round, bidders are not considered to have entered an exit bid at the starting price, and so there will be no final high bid in that case (and, therefore, there is no winning bidder).

Clause 12 Tiebreaker for 10 MHz lot

This section applies in relation to the 10 MHz lot if, during the final round for bids on the 10 MHz lot, no continue bid was made on the 10 MHz lot, two or more exit bids were made on the 10 MHz lot, and of those exit bids:

- (a) two or more of those exit bids were equal (the **tied exit bids**); and
- (b) the tied exit bids were greater than each other exit bid made in the final round.

Where this section applies, the winning bidder for the 10 MHz lot will be selected from the bidders who made the tied exit bids by pseudorandom selection, which must be conducted before the first round for bids on the 5 MHz lot.

For the purposes of paragraph 11(3)(d) of this Schedule, the final high bid for the 10 MHz lot is the amount of the last bid made by the winning bidder (i.e., the amount of the tied exit bids).

Clause 13 Tiebreaker for 5 MHz lot

This section applies in relation to the 5 MHz lot if, during the final round for bids on the 5 MHz lot, no continue bid was made on the 5 MHz lot, two or more exit bids were made on the 5 MHz lot, and of those exit bids:

- (a) two or more of those exit bids were equal (**the tied exit bids**); and
- (b) the tied exit bids were greater than each other exit bid made in the final round.

Where this section applies, the winning bidder for the 5 MHz lot will be selected from the bidders who made the tied exit bids by pseudorandom selection.

For the purposes of paragraph 11(4)(d) of this Schedule, the final high bid for the 5 MHz lot is the amount of the last bid made by the winning bidder (i.e., the amount of the tied exit bids).

Part 4 Bringing the auction to a close

Clause 14 Close of the auction

The auction will close immediately after either:

- (a) if clause 13 applies in relation to the 5 MHz lot – the pseudorandom selection mentioned in subclause 13(2) occurs; or
- (b) in any other case – the final round of the auction.

After the auction closes, the auction manager must tell each bidder, using the auction system, that the auction has closed.

SCHEDULE 2 PARTS OF THE SPECTRUM

Part 1 – 700 MHz band and residual 700 MHz band

The ‘700 MHz band’ is defined in subsection 4(1) of the Determination by reference to Schedule 2. This Schedule sets out that the parts of the spectrum in the 700 MHz band for the purpose of this allocation are the frequency ranges 703 to 748 MHz and 758 to 803 MHz in the designated area.

The ‘residual 700 MHz band’ is defined in subsection 4(1) of the Determination by reference to Schedule 2. This Schedule sets out that the parts of the spectrum in the residual 700 MHz band for the purpose of this allocation are the frequency ranges 733 to 748 MHz and 788 to 803 MHz in the designated area.

Part 2 – Lots

Part 2 of Schedule 2 defines the lots within the 700 MHz band to be allocated under the Determination. The 10 MHz lot represents the following frequency ranges:

- (a) 738 MHz to 748 MHz; and
- (b) 793 MHz to 803 MHz;

in the designated area.

The 5 MHz lot represents the following frequency ranges:

- (a) 733 MHz to 738 MHz; and
- (b) 788 MHz to 793 MHz;

in the designated area.

SCHEDULE 3 ALLOCATION LIMITS

Allocation limits are defined in section 10 of the Determination by reference to Schedule 3. This Schedule sets out that the allocation limits are 20 MHz of spectrum in the geographic areas specified in the designated area in each of the frequency ranges 703 MHz to 748 MHz and 758 MHz to 803 MHz. These are the limits set out in the Residual 700 MHz Spectrum Direction.