

Explanatory Statement

Radiocommunications Act 1992

Radiocommunications (Spectrum Access Charges—26 GHz Band) Direction 2020

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Purpose

The purpose of this instrument is to direct the Australian Communications and Media Authority (ACMA) to permit persons (i.e. successful bidders) to pay spectrum access charges in instalments, so long as they meet the terms and precondition set out in the direction.

Authority

The *Radiocommunications (Spectrum Access Charges—26 GHz Band) Direction 2020* (the Direction) is made by the Minister for Communications, Cyber Safety and the Arts under subsection 14(1) of the *Australian Communications and Media Authority Act 2005* (the ACMA Act) and subsection 294(2) of the *Radiocommunications Act 1992* (the Radcomms Act).

Subsection 14(1) of the ACMA Act enables the Minister to direct ACMA in relation to the performance of its functions or the exercise of its powers. ACMA's powers under the Radcomms Act include the power to determine the procedures to be applied in allocating spectrum licences (section 60), the power to issue spectrum licences that have been allocated under section 60 (section 62), and the power to include such conditions in a spectrum licence as it thinks fit (section 71).

Subsection 294(2) of the Radcomms Act specifically enables the Minister to direct ACMA about the matters dealt with in determinations made under subsection 294(1). Subsection 294(1) provides that ACMA may make written determinations that fix spectrum access charges payable by licensees for issuing spectrum licences and the times when those charges are payable.

Background

The COVID-19 pandemic has had a substantial financial impact across the Australian economy, including within the communications sector. Although the Government's 2018 Spectrum Pricing Review recommended that ACMA should generally require upfront lump-sum payments for spectrum access charges determined by auction, the review noted it may be appropriate for ACMA to provide the option of short-term deferred payments in exceptional circumstances, provided a mechanism to reduce risk to the Commonwealth is in place.

The short range and early stage nature of mmWave spectrum technologies will require licence holders to make significant up-front investments to utilise spectrum in the band. In light of the unprecedented economic circumstances, reducing the upfront capital costs required for spectrum licences in this band will release capital that bidders can direct towards investments to build Australia's 5G networks and stimulate the wider Australian economy. This will promote the Government's Communications Policy Objectives for the Allocation of the 26 GHz band (released in October 2019), which include supporting the deployment of 5G

technologies, promoting competitive market outcomes for the long term benefit of consumers, and encouraging investment in infrastructure, including in regional Australia.

The Direction requires ACMA to permit the payment of spectrum access charges for licences allocated and issued as a result of the 26 GHz auction in instalments, in accordance with the terms set out in the Direction for the amount and timing of instalment payments, and so long as the precondition set out in the Direction relating to provision of a bank guarantee is met.

The Direction does not remove the option for successful bidders to pay the spectrum access charge upfront, prior to the issue of the licence, if that is their preference. If payment is to be by instalments, the Direction requires the first instalment payment to be payable prior to the issue of the licence.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has confirmed that the preparation of a Regulation Impact Statement is not necessary, as the direction would have nil regulatory impact. The OBPR reference for this proposal is ID 43090.

Consultation

On 9 July 2020 ACMA released a public consultation paper on its draft legislative instruments for the 26 GHz band auction. The consultation paper included the issue of payment terms for the 26 GHz auction, and sought views on the option of instalment payments being applied for the auction.

In September 2020 the Department of Infrastructure, Transport, Regional Development, and Communications (DITRDC) conducted further targeted consultation with potential bidders on a proposed model for instalment payments for the 26 GHz allocation.

Responses from both these processes were taken into account in developing the terms of this Direction.

Notes on Sections

Section 1 – Name of instrument

Section 1 provides that the instrument is the *Radiocommunications (Spectrum Access Charge—26 GHz Band) Direction 2020* (the Direction).

Section 2 – Commencement

Section 2 provides for the commencement of the Direction. The Direction will commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the Direction is made under subsection 14(1) of the ACMA Act and subsection 294(2) of the Radcomms Act.

Section 4 – Definitions

Section 4 sets out definitions for the purposes of the Direction. The note to the section informs the reader that a number of terms used in the instrument are defined in the Radcomms Act, including ACMA, spectrum and spectrum licence.

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

Section 5 – Direction—spectrum access charge payable in instalments

Subsection 5(1) provides that the authority for the direction given in section 5 is derived from subsection 294(2) of the Radcomms Act.

Subsection 5(2) directs ACMA in making a relevant spectrum access charge for spectrum licences issued in the 26 GHz spectrum auction, to permit payment of that charge in instalments, subject to the terms and precondition set out in the instrument:

Subsection 5(3) provides that the terms for payment by instalments are to be that:

- the full amount of the charge must be payable in five instalments;
- each individual instalment must equal 20.32% of the upfront payment amount, that is, 20.32% of the relevant spectrum access charge that would be payable if the winning bidder elected to pay the full charge prior to the issue of the licence; and
- each instalment must be payable in accordance with the timeframes set out in subsections (4) to (6).

Subsection 5(4), provides that the first instalment must be payable prior to the issue of the licence.

Subsection 5(5) provides that the second instalment must be payable either:

- if the licence comes into force on the day on which it is issued—the day which is 12 months from that day; or
- if the licence comes into force later than the day on which it is issued—a day no earlier than 12 months from the day it is issued, but no later than 12 months from the day it comes into force.

This allows payment of the second and subsequent instalments for licences issued in the 26 GHz auction to be aligned with a common anniversary date if licences are issued before they come into force and come into force on a later date.

Subsection 5(6) provides that third, fourth and fifth instalments must be payable by the period set out in that subsection (which is each anniversary of the day by which the second instalment is payable until all instalments are paid).

The spectrum access charge for successful bidders who elect to pay by instalment will be set to be five equal sized payments which take into account interest that would have accrued across the period. These amounts include interest reflecting the discount value of the outstanding charge calculated at a rate that reflects the Australian Government's weighted average cost of borrowing or the public debt interest (PDI) in the forward estimates as released in the 2020-21 Budget on October 6 2020 which was 0.8% per annum. The application of an interest rate to deferred payments is appropriate to compensate for the impact to the Australian Government budget of offering an instalment payment option.

In total, a bidder who elects to pay by instalment will pay 101.6% of the upfront or auction winning price in five instalments over four years.

If a person has elected to pay their spectrum access charge in instalments, there is no opportunity for the charge to be reduced for early payment. However, any instalment may be paid at any time prior to the relevant due date for that instalment.

This section includes examples intended to assist the reader to understand how the provisions will operate using theoretical licence issue and commencement dates.

Section 6 – Direction—bank guarantee for instalment payments

Subsection 6(1) provides that the directions given under section 6 are authorised under subsection 14(1) of the ACMA Act.

Subsection 6(2) directs ACMA to require the provision of a bank guarantee at the time and in accordance with the terms set out in subsection (3), as a precondition to reaching an agreement with the person that they may pay the relevant spectrum access charge for their spectrum licence in instalments.

As indicated in the note to this subsection, subsection 62(2) of the Radcomms Act provides that ACMA must issue a spectrum licence to the person to whom it is allocated so long as that person has either paid the spectrum access charge for issuing the licence, or reached agreement with ACMA for the payment of that charge. While section 5 of this determination is intended to require ACMA to permit, in making a charges determination, the payment of the charge by instalments, ACMA will need to reach agreement for the payment of the charge in that manner before being required to issue a spectrum licence. The intention of the direction in subsection 6(2) is that ACMA is not to reach an agreement with a person to allow that person to pay the charge in instalments unless a bank guarantee has been provided by the person on the terms set out in subsection 6(3).

Subsection 6(3) provides that the bank guarantee must:

- be required to be provided prior to the day on which the spectrum licence is issued;

- be required to be provided by the person only for and during the period which the spectrum charge remains owing by that person; and
- provide security to the Commonwealth for an amount equal to 5% of the amount of the relevant spectrum access charge still owing to the Commonwealth at any point in time.

The examples provided in the direction illustrate that the amounts required to be guaranteed will reduce with the payment of each instalment.

A bank guarantee mitigates the risk to the Commonwealth in the case of default. It balances the need to manage the Commonwealth's exposure to lost licence fees and administrative costs of revoking and reissuing a licence in the event that the full spectrum access charges were not paid, with the financial burden of a bank guarantee on potential bidders.

Subsection 6(4) directs ACMA, in issuing a relevant spectrum licence for the 26 GHz auction for which the spectrum access charge is to be paid in instalments, to consider whether the licence should include a condition with the effect of requiring the licensee to ensure that the bank guarantee is in force at all times during which the whole or part of the spectrum access charge remains owing. The direction provides that if the ACMA thinks it fit that the licence include such a condition, the licence is to include such a condition. The note to this subsection informs the reader that section 71 of the Radcomms Act empowers the ACMA to include in a spectrum licence such other conditions (being conditions other than those referred to in sections 66 to 69A of the Act) as it thinks fit.

Section 7 – No limitation

Section 7 notes that ACMA may make a charges determination covering matters (or aspects of matters) that are not specified in the Direction, provided that those matters are not inconsistent with the requirements in the Direction.