

Explanatory Statement

Radiocommunications Act 1992

Radiocommunications (Spectrum Access Charges—3.4 GHz Band) Direction 2020

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

Purpose

The purpose of the *Radiocommunications (Spectrum Access Charges—3.4 GHz Band) Direction 2020* (the Direction) is to direct the Australian Communications and Media Authority (ACMA) to fix the amounts of spectrum access charges (SACs) for the issue of spectrum licences to NBN Co Ltd (NBN Co) to replace its apparatus licences in the 3.4 GHz band, and specify the times at which those charges are payable in certain circumstances, in accordance with the Direction.

Authority

The Direction is made by the Minister for Communications, Cyber Safety and the Arts (the Minister) under subsection 294(2) of the *Radiocommunications Act 1992* (the Act).

Subsection 294(1) provides that ACMA may make determinations fixing the charges payable by licensees for the issue of spectrum licences, and specifying the times at which those charges are payable (SAC determinations). Subsection 294(2) provides that the Minister may give ACMA written directions about the matters dealt with in SAC determinations.

Background

The making of the *Radiocommunications (Spectrum Designation—3.4 GHz Band) Notice 2020* (the Notice) will require ACMA to take steps to offer to convert NBN Co's apparatus licences in the 3.4 GHz band to spectrum licences. A key objective of this process is to enable the defragmentation of the band, noting that the band is otherwise largely spectrum licensed.

The conversion process will include ACMA specifying, in each offer to NBN Co of a converted spectrum licence, the amount of the SAC NBN Co must pay to the Commonwealth for the licence.

The Direction will require ACMA to fix the SACs payable by NBN Co for the issuing of spectrum licences in the 3.4 GHz band, and the times at which some of those SACs are payable, in accordance with the terms of the Direction.

Regarding outer-metropolitan areas, the Minister has directed ACMA to set a SAC of \$57,146,840, assuming a licence period of nine years and six months. In giving the Direction, the Minister recognises that NBN Co's fixed-wireless network delivered using this spectrum provides substantial public benefits. In conjunction with the Notice, this Direction accords with the overall object of the Act. The conversion of NBN Co's apparatus licences to spectrum licences in order to facilitate defragmentation will maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum. Providing NBN Co ongoing access to this spectrum for its fixed-wireless network, at a price which takes into account the public benefit of that use of the spectrum, also supports the Government's communications policy objective in relation to the provision of affordable, high-speed broadband access to Australians across the NBN multi-technology mix.

Regarding inner-metropolitan areas, the Minister has directed ACMA to set a SAC of \$226,441,720, assuming a licence period of nine years and six months (expiring 13 December 2030 in line with other spectrum licences in this band). In setting this price, the Minister has considered previous auction results for similar spectrum in Australia and around the world. In light of NBN Co's lack of use of this part of the spectrum, the Minister has communicated an expectation that NBN Co should relinquish its unused spectrum after defragmentation is achieved. Accordingly, an alternative inner-metropolitan charge of nil is set such that if all the relevant spectrum licences are no longer in force on the first anniversary of the day on which the licence came into force. If any relevant spectrum licence is in force after the anniversary of the day on which the first relevant licence came into force, the entire charge of \$226,441,720 will be payable.

The Direction will also require ACMA to permit NBN Co to pay the outer-metropolitan charge in 10 equal instalments. If NBN Co chooses to pay the outer-metropolitan charge in instalments, the first instalment will be payable prior to the first relevant spectrum licence coming into force. All subsequent payments will be payable on each anniversary of the first relevant spectrum licence coming into force.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) was consulted about the making of the Direction. OBPR noted the matters arising from the Direction were related to a certified independent review conducted by ACMA, provided to OBPR in March 2020 (Optimisation of Arrangements in the 3400 – 3575 MHz Band) and that no further regulatory impact statement was required. The OBPR reference number for the Direction is 25773.

Consultation

The Department of Infrastructure, Transport, Regional Development and Communications consulted ACMA and NBN Co on the matters contained in the Direction in October and November 2020.

Notes on Sections

Section 1 – Name of instrument

This section provides that the name of the Direction is the *Radiocommunications (Spectrum Access Charges—3.4 GHz Band) Direction 2020*.

Section 2 – Commencement

This section provides that the Direction commences on the day after it is registered on the Federal Register of Legislation, which may be accessed online at www.legislation.gov.au.

Section 3 – Authority

This section provides that the Direction is made under subsection 294(2) of the *Radiocommunications Act 1992*.

Section 4 – Definitions

This section sets out a number of definitions for the purposes of the Direction. The section also notes that some terms, such as ACMA and spectrum, are defined in the *Radiocommunications Act 1992*.

The term ‘Act’ is defined to mean the *Radiocommunications Act 1992*.

The term ‘charges determination’ is defined to mean a determination that is made under subsection 294(1) of the Act and that either fixes spectrum access charges payable by licensees for issuing relevant spectrum licences, or specifies the times when those spectrum access charges are payable, or both.

The term ‘designated area’ is defined to mean an inner-metropolitan or an outer-metropolitan area.

The term ‘Hierarchical Cell Identification Scheme’ or ‘HCIS’ is defined to mean the Hierarchical Cell Identification Scheme used as part of the Australian Spectrum Map Grid 2012 published by ACMA, as the document existed at the time this instrument was made.

The term ‘inner-metropolitan area’ is defined by reference to clause 1 of Schedule 1. This clause defines ‘inner-metropolitan area’ to mean an area referred to in column 1 of the table in clause 1 of Schedule 1, to be ascertained as the composite of the areas described using identifiers from the HCIS, set out in column 2 of that table.

The term ‘NBN Co’ is defined to mean NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed).

The term ‘outer-metropolitan area’ is defined by reference to clause 2 of Schedule 1. This clause defines ‘outer-metropolitan area’ to mean an area referred to in column 1 of the table in clause 2 of Schedule 1, to be ascertained as the composite of the areas described using identifiers from the HCIS, set out in column 2 of that table.

The term ‘relevant part of the spectrum’ is defined to mean the part of the spectrum including all frequencies greater than 3400 MHz up to and including 3542.5 MHz.

The term ‘relevant spectrum licence’ is defined to mean a spectrum licence issued under subsection 57(1) of the Act to replace an apparatus licence that, at the time the licence is issued, authorises the operation of radiocommunications devices at frequencies within one or more relevant parts of the spectrum and within a designated area. This definition is included to ensure that the Direction only applies in relation to licences which are issued as a result of the conversion process triggered by the making of the Notice.

Section 5 – Direction—spectrum access charge for relevant spectrum licences

Subsection 5(1) of the Direction directs ACMA, in making a determination that fixes a SAC payable by NBN Co for issuing a relevant spectrum licence to fix the amount of the charges and specify the times at which those charges are payable in accordance with the section.

Subsection 5(2) sets out the aggregate amount of the spectrum access charges payable by NBN Co for issuing one or more relevant spectrum licence that authorise the operation of radiocommunications devices within an inner-metropolitan area (the ‘inner-metropolitan charge’).

Paragraph 5(2)(a) provides that the inner-metropolitan charge must be—if all relevant spectrum licences are no longer in force at the start of the day on the first anniversary of the first of those licences coming into force—nil.

Paragraph 5(2)(b) provides that the inner-metropolitan charge must be—if any relevant spectrum licence is still in force at the start of the day on the first anniversary of the first of those licences coming into force—\$226,441,720.

The amount of the charge if the licence is still in force at the time specified in paragraph (b) assumes a licence period of nine years and six months (expiring 13 December 2030 in line with other spectrum licences in this band). This charge is based on previous auction results for similar spectrum in Australia and around the world, as well as the fact that NBN Co does not currently utilise this spectrum. The alternative charge in paragraph (a) takes into account ACMA’s intended plan for the 3.4 GHz band and the Minister’s expectations, which have been communicated to NBN Co, that NBN Co should relinquish this spectrum in light of its current disuse, shortly after the conversion of its apparatus licences (following achievement of defragmentation).

Subsection 5(3) provides that the inner-metropolitan charge, if any, must be payable on either: (a) if only one relevant spectrum licence is issued—the first anniversary of the day on which that licence came into force, or (b) if more than one relevant spectrum licence is issued—the day which is the first anniversary of the first of those licences coming into force.

For example, if ACMA issues to NBN Co a single relevant spectrum licence that authorises the operation of radiocommunications devices within an inner-metropolitan area, which comes into force on 1 July 2021, the charge payable by NBN Co would be, if that licence is no longer in force by the start of the day on 1 July 2022, nil. The charge payable by NBN Co, if the licence is still in force at the start of the day on 1 July 2022 will be \$226,441,720, payable on 1 July 2022.

Or, if ACMA issues to NBN Co three relevant spectrum licences that authorise the operation of radiocommunications devices within an inner metropolitan area, which come into force on 1 July 2021, 5 July 2021 and 10 July 2021, the charge payable by NBN Co would be, if all three licences are no longer in force by the start of the day on 1 July 2022, nil. The charge payable by NBN Co if any of the three licences are still in force at the start of the day on 1 July 2022 will be \$226,441,720, payable on 1 July 2022. For instance, if the licence that came into force on 10 July 2021 was still in force on 1 July 2022, and the other two licences were no longer in force at the start of 1 July 2022, the charge payable will be \$226,441,720.

Subsection 5(4) provides that the aggregate amount of the spectrum access charge payable by NBN Co for issuing one or more relevant spectrum licences that authorises the operation of radiocommunications devices within a designated area that is an outer-metropolitan area (outer-metropolitan charge) must be \$57,146,840. In deciding upon this price, the Minister recognises that NBN Co's fixed-wireless network provides substantial public benefits using this spectrum.

Subsection 5(5) provides that NBN Co is to be permitted to pay the outer-metropolitan charge in instalments, subject to the terms in subsection 5(6).

Subsection 5(6) provides that if NBN Co elects to pay the outer-metropolitan charge in instalments, it must be required to do so subject to the conditions that: (a) the charge must be payable in 10 equal instalments; (b) the first instalment must be payable prior to (i) if one relevant spectrum licence is issued—that licence coming into force, or (ii) if more than one relevant spectrum licence is issued—the first of those licences coming into force; and, (c) each subsequent instalment must be payable annually on: (i) if one relevant spectrum licence is issued—each anniversary of that licence coming into force, or (ii) if more than one relevant spectrum licence is issued—each anniversary of the day the first licence coming into force, until the full amount of the outer-metropolitan charge is paid.

For example, if ACMA issues to NBN Co a single relevant spectrum licence that authorises the operation of radiocommunications devices within an outer-metropolitan area, which comes into force on 1 July 2021, and NBN Co elects to

pay the outer-metropolitan charge in instalments, the first instalment must be payable prior to 1 July 2021. Each subsequent instalment will be payable annually on 1 July, beginning 1 July 2022.

If ACMA issues to NBN Co three relevant spectrum licences that authorise the operation of radiocommunications devices within an outer-metropolitan area, which come into force on 3 July 2021, 7 July 2021 and 12 July 2021, and NBN Co elects to pay the outer-metropolitan charge in instalments, the first instalment must be payable prior to 3 July 2021. Each subsequent instalment will be payable annually on 3 July, beginning 3 July 2022.

In relation to subsection (5), it is not intended that ACMA require NBN Co to pay in instalments if NBN Co wishes to pay up front. However, if NBN Co chooses to pay in instalments, ACMA must require the instalments to be paid in accordance with subsection (6).

Further, it is not intended that paragraph (6)(b) limit the time at which ACMA may require payment of the first instalment, providing that the licence will not come into force earlier than the time at which the charge is payable.

Schedule 1—Designated Areas

Clause 1 – Inner-metropolitan areas

This clause provides that, in the Direction, inner-metropolitan area means an area referred to in column 1 of the table in this clause, ascertained as the composite of the areas, described using identifiers from the HCIS, set out in column 2 of that table.

Clause 2 – Outer-metropolitan areas

This provides that, in the Direction, outer-metropolitan areas means an area referred to in column 1 of the table in this clause, ascertained as the composite of the areas, described using identifiers from the HCIS, set out in column 2 of that table.