

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023 (the determination)* under section 60 and section 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. 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. Provisions of the determination made in reliance on section 60 of the Act are not subject to disallowance (see paragraph 44 (2)(b) of the *Legislation Act 2003 (the LA)* and item 29 in the table at regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

However, provisions of the determination which rely on section 294 of the Act are subject to disallowance and each such provision is identified in the notes at Attachment A. The relevant provisions of the Determination that are subject to disallowance are as follows:

- section 9;
- paragraph 22(c);
- paragraph 22(d);
- paragraph 25(1)(a);
- paragraph 25(1)(c);
- section 65;
- subsection 72(8);
- Division 7 of Part 5;
- section 112;
- section 131;
- section 143;
- section 144;
- section 147.

All other provisions of the determination are not subject to disallowance. According to the explanatory statement for the *Legislation (Exemption and Other Matters) Regulation 2015* and the explanatory memorandum to the Legislative Instruments Bill 2003, exposure of the determination to disallowance, to the extent it is made under section 60 of the Act, could cause commercial delay or commercial uncertainty.

The ACMA considers that, given the close and complex interrelationship between the provision made under section 60 and the provisions made under section 294, it is not practical to make two instruments.

The entire determination is subject to the sunset provisions in Part 4 of Chapter 3 of the LA.

Purpose and operation of the instrument

The determination sets out the procedures to be applied in allocating spectrum licences in relation to specified parts of the spectrum within the following frequency bands (collectively, **the 3.4/3.7 GHz bands**):

- 3400 MHz to 3575 MHz (**3.4 GHz band**);
- 3700 MHz to 3800 MHz (**3.7 GHz band**).

The 3.4/3.7 GHz bands allocation process consists of:

- the direct allocation of particular parts of the spectrum (called **leftover lots**) in the 3.4 GHz band;
- the 3.7 GHz auction;
- the 3.4 GHz auction (including the allocation of any leftover lots not directly allocated to a person).

Licences for the 3.4 GHz band and licences for the 3.7 GHz band will be allocated in sequential auctions using a two-stage generic lots clock (**TSGLC**) auction format. Leftover lots may be directly allocated to identified persons for a set price before the 3.7 GHz auction. Any leftover lots that are not allocated for a set price will be allocated in the assignment stage of the 3.4 GHz auction to the person who is allocated a lot of a product that is adjacent to the leftover lot, where that lot is assigned the frequencies adjacent to the leftover lot.

The determination also fixes the spectrum access charges payable by the persons to whom such licences are allocated. Throughout the determination, prices are rounded up to the nearest hundred dollars and bids are to be made as a multiple of one hundred dollars.

In conducting this allocation, the ACMA is guided by the object of the Act, which requires the ACMA to promote the long-term public interest derived from the use of the spectrum, including by facilitating the efficient planning, allocation and use of the spectrum and supporting the communications policy objectives of the Commonwealth Government. Under section 28C of the Act, the ACMA is also required to have regard to any relevant Ministerial policy statements, in the performance of the ACMA's spectrum management functions or the exercise of the ACMA's spectrum management powers.

The *Radiocommunications (Ministerial Policy Statement - 3.4–4.0 GHz) Instrument 2022 (3.4 – 4.0 GHz Statement)* specifies specific Commonwealth Government communications policy objectives that apply in the ACMA's performance of its spectrum management functions, and exercise of its spectrum management powers, in relation to the 3.4–4.0 GHz band. The 3.4/3.7 GHz bands fall within the 3.4–4.0 GHz band, and accordingly the ACMA has had regard to the 3.4 – 4.0 GHz Statement in preparing the determination.

Background

To enable the allocation of the 3.4/3.7 GHz bands, on 14 July 2022 the ACMA made the [*Radiocommunications \(Spectrum Re-allocation – 3.4 GHz and 3.7 GHz Bands\) Declaration 2022 \(the re-allocation declaration\)*](#). The re-allocation declaration provides that the 3.4/3.7 GHz bands in defined metropolitan, regional and rural areas in Australia are subject to re- allocation by issuing spectrum licences.

In preparation for the allocation of spectrum licences, the ACMA has made a package of instruments, including the *Radiocommunications Spectrum Marketing Plan (3.4/3.7 GHz Bands) 2023 (the marketing plan)*.

Overview

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

The allocation procedures describe the necessary application and registration processes for persons to become eligible to be allocated leftover lots and bid for lots and frequencies in the auctions. This process includes the submission of required documentation and the payment of an application fee, as well as the making of an eligibility payment or the provision of a deed of financial security (or a combination of both).

Rules governing how applicants can bid on spectrum in the auctions are set out in the determination. The ACMA will auction spectrum in the 3.7 GHz band, followed by an auction of spectrum in the 3.4 GHz band. Spectrum available in each auction is divided into the products described in the marketing plan. The marketing plan divides the 3.4 GHz band into 34 products, and the 3.7 GHz band into 20 products. Each product is defined by a frequency range and geographic region. Products are divisible into an assigned number of individual units of 5 MHz bandwidth called lots. There are a total of 300 lots available in the 3.4 GHz auction, and 260 lots available in the 3.7 GHz auction. The marketing plan classifies most products as either a metropolitan product or a regional product.

Parts of the 3.4 GHz band are not represented by products: these are the leftover lots. The marketing plan defines 28 leftover lots, each of 2.5 MHz bandwidth. Each leftover lot is defined by a frequency range and geographic region. All leftover lots are in the 3.4 GHz band. Rules governing how an identified person can apply to be directly allocated a leftover lot are set out in the determination. The ACMA has identified, in the marketing plan, the persons that can apply to be directly allocated a leftover lot. A person has been identified in relation to a leftover lot if they already hold a spectrum licence that both shares the same geographic region as the leftover lot and has a frequency range that adjoins the frequency range of the leftover lot, or if they are a related body corporate of such a person. An identified person who applies to be directly allocated a leftover lot will be allocated that lot immediately after the eligibility deadline. Each leftover lot not directly allocated to an identified person may be allocated to a bidder who participates in the assignment stage of the 3.4 GHz auction.

The allocation procedures set out the allocation limits that are imposed in relation to the 3.4/3.7 GHz bands allocation process. As permitted by subsection 60(5) of the Act, the determination imposes limits on the aggregate of the parts of the spectrum that, under existing spectrum licences and as a result of the allocation of spectrum licences under the determination, may be used by any one person, or by a ‘relevant group of persons’. A ‘relevant group of persons’ consists of a person and all the person’s ‘associates’, as defined in the determination.

The effect of these allocation limits is that no person, and no relevant group of persons, may, under existing spectrum licences and as a result of the allocation of a spectrum licence that is enabled by the re-allocation declaration, use more than an aggregate of:

- 140 MHz in the 3400 MHz to 3800 MHz frequency band in the area of a metropolitan product; and

- 160 MHz in the 3400 MHz to 3800 MHz frequency band in the area of a regional product.

Some spectrum licences are already in force in the 3400 MHz to 3800 MHz frequency band. The combination of the allocation limits and the existing licences affects what new licences may be allocated to a person who holds one or more of these existing licences, or who is in the same relevant group of persons as a person who holds one or more of these existing licences.

Each existing spectrum licence authorises the operation of radiocommunications devices in one or more ‘spectrum spaces’. A spectrum space is a combination of a frequency band (for example, 3400 MHz to 3450 MHz) and a geographic area (for example, a defined area around Albury). The nature of the existing spectrum licences in the 3400 MHz to 3800 MHz frequency band is such that there is little uniformity between the spectrum spaces in those licences and the products in the 3.4/3.7 GHz bands. Accordingly, the determination sets out rules that allow some ‘spectrum spaces’ to be disregarded for the purposes of the allocation limits, in relation to a particular person and a particular product (for example, spectrum space that a person is authorised to use in Albury in the 3400 MHz to 3800 MHz frequency band may be disregarded when applying allocation limits for that person in the Rural VIC Upper product). The detail for these rules is set out in Attachment A (see, in particular, the explanation of sections 12 to 14 of the determination).

Further:

- any leftover lots allocated to a person will be disregarded for the purposes of the allocation limits;
- the Regional WA Central Middle product in the 3.4 GHz band is neither a metropolitan product nor a regional product, and will be excluded for the purposes of the allocation limits.

Each auction will be conducted via a secure online system using the TSGLC format.

1. **Primary stage**—The primary stage consists of a pre-bidding round, followed by a series of clock rounds for bidding. During the pre-bidding round, bidders enter a number of lots of each product, and elect whether to adopt the minimum spectrum requirement (**MSR**) for each product, in the auction system.

The clock rounds progress according to a clock function. All lots of all products are offered simultaneously for bidding during these rounds. In each round, bidders indicate their demand for generic lots of each product. A bid is a request for a particular number of lots at a particular price point. In each clock round, bidders may make one bid per available product. Therefore, in the first clock round, bidders indicate whether they wish to bid for a different number of lots of a product than was entered in the pre-bidding round, and the price point at which they wish to change their demand, or whether to maintain their bid for the same number of lots of a product.

Bids may be changed at any time until the nominated end time of the clock round. At the end of each round, the auction system processes all bids in accordance with the processing algorithm set out in section 107 of the determination. If demand exceeds supply for any product, the auction continues to the next clock round. The primary stage concludes when there is no excess demand across all products. Detailed rules about the primary stage are set out in Division 1 of Part 6 of the determination.

2. **Secondary stage**—After the primary stage has finished, if any single generic lot remains unallocated in any product (**residual lots**), a secondary stage commences in relation to those lots in accordance with the procedures set out in Division 2 of Part 6 of the determination.

These residual lots typically arise from operation of the MSR feature, but may also result from insufficient bidder demand. The secondary stage uses an online version of the English Open Outcry auction format with a simple ascending bid methodology. The secondary stage consists of a pre-bidding round, followed by a series of rounds for bidding. All residual lots will be offered concurrently within this stage. During the pre-bidding round, eligible bidders may express demand for a lot by entering a valid starting price bid. The starting prices for the secondary stage are the same as for the primary stage. Bidders continue bidding in the rounds until there is no excess demand for the lot. The secondary stage concludes when the final round has concluded for each residual lot available for bidding in the secondary stage.

3. **Assignment stage**—The purpose of the assignment stage is to assign specific frequencies within the relevant band to the allocated generic lots. Successful bidders from the primary and secondary stages are invited to submit bids on frequency range options determined by the auction manager, using the auction software in accordance with the procedures set out in Division 3 of Part 6 of the determination.

In the assignment stage of the 3.4 GHz auction, leftover lots not directly allocated to an identified person will be allocated to the bidder whose lots are assigned the frequencies adjacent to the leftover lot. There is no additional amount to be paid for the leftover lots allocated in the assignment stage.

Other matters

The determination is part of a suite of legislative instruments required to allocate spectrum licences in the 3.4/3.7 GHz bands. These other instruments provide additional information about the auctions and the spectrum licences that will be available for allocation.

Under section 39A of the Act, the ACMA has made the marketing plan for the 3.4/3.7 GHz bands. The marketing plan specifies the spectrum available and the conditions that will apply to its use under spectrum licences. The technical conditions to be included in spectrum licences allocated in accordance with the marketing plan and the determination are drawn from the ACMA's technical framework for the 3.4/3.7 GHz bands, as set out in the following legislative instruments:

- *Radiocommunications (Unacceptable Levels of Interference – 3.4 GHz Band) Determination 2015*;
- *Radiocommunications Advisory Guidelines (Managing Interference from Spectrum Licensed Transmitters – 3.4 GHz Band) 2015*;
- *Radiocommunications Advisory Guidelines (Managing Interference to Spectrum Licensed Receivers – 3.4 GHz Band) 2015*.

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

Documents incorporated by reference

Subsection 314A(1) of the Act provides that an instrument under the Act may make provision in relation to a matter by applying, adopting, or incorporating (with or without modifications) provisions of any Act as in force at a particular time, or as in force from time to time. Subsection 314A(2) of the Act provides that an instrument under the Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matters contained in any other instrument or writing as in force or existing at a particular time or from time to time. The determination incorporates the following Acts and legislative instruments by reference, or otherwise refers to them:

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- the *A New Tax System (Australian Business Number) Act 1999*;
- the Act;
- the *Acts Interpretation Act 1901*;
- the *Australian Communications and Media Authority Act 2005 (ACMA Act)*;
- the *Banking Act 1959*;
- the *Competition and Consumer Act 2010*;
- the *Corporations Act 2001*;
- the *Criminal Code* (in the *Criminal Code Act 1995*);
- the *Insurance Act 1973*;
- the LA;
- the *Legislation (Exemptions and Other Matters) Regulation 2015*;
- the marketing plan;
- the re-allocation declaration;
- the *Telecommunications Act 1997*.

The Acts and legislative instruments listed above may be obtained, free of charge, from the Federal Register of Legislation (www.legislation.gov.au).

The determination also incorporates the ‘HCIS – List of Population Data’ document, published by the ACMA, as that document existed at the time the determination commenced. The HCIS – List of Population Data document is available, free of charge, from the ACMA’s website (www.acma.gov.au).

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.

A draft version of the determination was released for public consultation on 13 February 2023, together with the consultation paper [Draft allocation and technical instruments for 3.4-3.7 GHz bands auction](#). (**draft allocation instruments consultation**). The draft allocation instruments consultation included consultation on a draft version of the determination, a draft version of the marketing plan and draft technical instruments. Consultation closed on 29 March 2023. The ACMA received 11 public submissions in response to the draft allocation instruments consultation. Of the 11 submissions, 7 were relevant to the draft determination. The ACMA had regard to the views of stakeholders during the finalisation of the determination.

The following summarises key proposals in the draft version of the determination where submitters expressed contrary views.

The ACMA proposed that the 3.4/3.7 GHz bands spectrum be sequentially allocated, starting with the allocation of 3.7 GHz band spectrum through all three auction stages (primary, secondary and assignment) followed by the allocation of the 3.4 GHz band spectrum through all three auction stages. Four of the five submissions that commented on this issue supported the ACMA’s proposal. One submission supported the ACMA’s proposal for sequential auctions; however, the submission proposed that the spectrum be allocated in three phases: the first for the 3.7 GHz band metropolitan products, the second for the 3.7 GHz band regional products, and the third for the 3.4 GHz band products. The ACMA considered that the benefits of three auctions rather than two were outweighed by the disadvantages, including the increased exposure risk to bidders, the decreased capacity for bidders to express demand across complementary products dynamically, and the additional cost and

time to the potential bidders and the ACMA. Accordingly, the ACMA did not make any changes to the structure of the auctions.

The draft determination included a power for the ACMA to delay the commencement date and time of the 3.7 GHz auction exercisable at least two working days before the set commencement date and time of the 3.7 GHz auction, and by at least 10 working days. This is to give the ACMA the capacity to make changes to the auction system in light of any unexpected issues being identified during the mock auctions, noting the drafting allows for a delay for any reason. Three submissions commented on the proposal. One submission generally supported the ACMA's proposal, and two submissions suggested changes to the timing of the notice to be given, and the length of the potential delay. The ACMA considers that it cannot predict when an issue may be identified, and so the power to delay the commencement of the auction late in the process is necessary. The ACMA also cannot predict how long it will take to resolve an issue that may arise. Therefore, a maximum timeframe to resolve unknown issues is not feasible. The ACMA considers a minimum 10 working days delay will provide certainty to stakeholders that the ACMA will not reschedule the auction to commence too quickly, and provides bidders reasonable notice to bring together their auction teams following a delay. It will also allow the ACMA time to assess and resolve any issues ahead of the auction commencing. Therefore, the ACMA has retained this power in the allocation determination.

The ACMA proposed to apply an MSR of 2 lots for each product in the auctions. All three submissions on this matter supported the ACMA's proposal. However, one of the submissions requested the ACMA to consider the inclusion of a bidding system where a bidder could, in making an increase bid, specify that if the bid was not applied in full, that the bid should be for a specified, lower number of lots, like an individualised MSR. The ACMA considers a bidding system such as this may result in unsold lots and gaming behaviour in the auction. On that basis, the ACMA has not made any changes in relation to this matter.

The ACMA proposed to provide exact excess demand information to bidders at the end of each clock round in the primary stage of the auctions. All three submissions on this matter supported the proposed information policy. However, one of the submissions proposed that detailed information about exact bidder demand for regional lots in each 3.7 GHz auction clock round should be provided (i.e., identifying which bidders made which bids, or alternatively, anonymising the bidder identity). Consistent with previous auctions, the ACMA does not propose to provide more detailed information about bidder demand in each auction round. The ACMA considers providing this information would enable bidders to potentially coordinate bidding for the purpose of keeping prices suppressed, which may be detrimental to the auction outcome, and so no change was made.

The ACMA proposed that the frequency range of any unsold lots be contiguous and be determined based on the assignment bids, rather than pre-assigned to a particular part of the relevant frequency band. Submissions suggested various changes to this. The ACMA considers that the purpose of the assignment stage is to enable bidders to express their demand for the frequency location of the lots allocated to them. So, for example, if a bidder values contiguity with existing spectrum licences, then the bidder should bid accordingly in the assignment stage. Therefore, the ACMA did not make a change to the determination.

The ACMA also proposed to show all assignment bid options for frequency ranges in the assignment stage, rather than just the feasible frequency range options. One submitter proposed that only feasible assignment bid options should be presented in the assignment stage. The ACMA considers that showing only winnable options may reveal information about the winnings of other bidders which can

be used by bidders to game the assignment stage. We also note that our approach has been used in other jurisdictions. On that basis, the ACMA did not make a change to the determination.

The ACMA proposed to include a power in the allocation determination for the ACMA to vary starting prices and the set price of leftover lots after applications open, but before the eligibility deadline. If the ACMA varied the starting prices or the set price of leftover lots, the application deadline and eligibility deadline would be extended. Two submissions generally opposed the variation of prices. However, the ACMA considers that this may be an appropriate tool to respond to any major market changes or other significant changes that occur after the 3.4/3.7 GHz bands allocation process is advertised. Therefore, the ACMA has not removed this power from the determination.

The ACMA proposed to require upfront payment of winning prices before licence issue. Two submissions preferred to have the option to pay by instalments. However, the Spectrum Pricing Review (available from the website of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts), finalised in 2018, recommended that the ACMA should generally require upfront payments. The ACMA was not persuaded that instalment payments were warranted for these auctions. Therefore, upfront payments have been maintained in the determination.

The ACMA did not propose to provide any information about the outcome of the 3.7 GHz auction before the commencement of the 3.4 GHz auction. In response to stakeholder feedback, the ACMA considered the prospect that bidders participating in both the 3.7 GHz auction and the 3.4 GHz auction may have additional information that could be used to formulate bid strategy based on their own demand, compared to bidders participating only in the 3.4 GHz auction. The ACMA considers that releasing information about the outcome of the 3.7 GHz auction to all registered bidders ahead of the 3.4 GHz auction is unlikely to increase the risk of strategic behaviour in the 3.4 GHz auction. Therefore, a change was made in the determination to provide for some information about the outcome of the 3.7 GHz auction to be released to all bidders before the commencement of the 3.4 GHz auction.

In accordance with subsection 60(13A) of the Act, the ACMA consulted with the Australian Competition and Consumer Commission (ACCC) about whether the determination should impose allocation limits and, if so, the nature of those limits. On 1 August 2022, the ACCC recommended that the allocation limit should be 140 MHz in all areas in the 3400 MHz to 3800 MHz frequency band. During the draft allocation limits consultation, the ACMA consulted on three options for the limits:

- Option 1: As a result of the auctions, no bidder could hold more than 140 MHz of spectrum in all areas in the 3400 MHz to 3800 MHz frequency band;
- Option 2: As a result of the auctions, no bidder could hold more than 140 MHz of spectrum in metropolitan areas, and 160 MHz of spectrum in regional areas, in the 3400 MHz to 3800 MHz frequency band;
- Option 3: No limits be imposed.

Submissions were largely divided, and some proposed several suggested alternatives to the three options (including alternative allocation limits, and taking into account spectrum licences outside the 3400 MHz to 3800 MHz frequency band). Based on the consultation submissions, the ACMA's consultation with the ACCC as required under subsection 60(13A), and the ACMA's own analysis of relevant technical, practical and policy matters (including an assessment of approaches adopted internationally), the ACMA has adopted Option 2, as the ACMA considers it enhances the likelihood of an efficient allocation, while also promoting competition in downstream markets and supporting

digital connectivity and investment in regional Australia. The ACMA prepared an impact analysis equivalent, available on the Office of Impact Analysis website, which outlines the analysis we undertook to support this conclusion.

As outlined in the draft allocation instruments consultation, following receipt of the ACCC advice the ACMA conducted its own analysis of the technical characteristics of the spectrum, the complexity of the application of allocation limits and the approaches used in other jurisdictions. The ACMA has further considered these matters in light of the submissions received.

Considering the technical characteristics of the spectrum, the ACMA agrees with the views expressed in one submission that spectrum in the 2.3 GHz band (2302 MHz to 2400 MHz) is broadly substitutable with spectrum in the 3.4 GHz to 4.0 GHz band (including the 3.4/3.7 GHz bands). The ACMA agrees that 2.3 GHz band spectrum is more directly substitutable for the 3.4 GHz to 4.0 GHz band than other ‘midband’ spectrum that is subject to spectrum licensing. Midband spectrum includes:

- the 2.5 GHz band (2500 MHz to 2570 MHz and 2620 MHz to 2690 MHz);
- the 2 GHz band (1920 MHz to 1980 MHz and 2110 MHz to 2170 MHz);
- the 1800 MHz band (1710 MHz to 1785 MHz and 1805 MHz to 1880 MHz).

The 2.3 GHz band is more directly substitutable for the 3.4 GHz to 4.0 GHz band than other midband spectrum due to the similarity in frequency range, the bandwidths available and the use of time division duplex when operating devices. However, all midband spectrum can, to varying degrees, be used to provide similar services and is, to differing extents, partially substitutable with spectrum in the 3.4 GHz to 4.0 GHz band.

As indicated in the ACMA’s draft allocation instruments consultation, the ACMA notes that, while the 5G equipment ecosystem is currently more mature in the 3300 MHz to 3800 MHz frequency range, equipment availability for other midband spectrum is rapidly increasing and is expected to continue to do so. The ACMA therefore considers that any near-term differences in equipment availability across these bands are of limited relevance, which supports the view that in the medium to longer term these bands will become more substitutable from an equipment ecosystem perspective.

Although the 2.3 GHz band (and other midband spectrum, to varying degrees) is broadly substitutable for the 3.4 GHz to 4.0 GHz band, the ACMA has taken into account other matters relevant to whether spectrum licences in the 2.3 GHz band (or in other midband spectrum) should be counted for the purposes of assessing whether the allocation of spectrum licences to a person would exceed the allocation limits.

The nature of the existing spectrum licences in midband spectrum is such that there is little uniformity or consistency in the geographic areas in which they authorise the operation of devices. The misaligned geographic areas of existing licences in the 2.3 GHz band (and further misalignment in some other midband spectrum) with the 3.4 GHz products and the 3.7 GHz products, and with the existing spectrum licences in the 3400 MHz to 3800 MHz frequency band, would substantially increase the complexity of implementation associated with allocation limits, and therefore would require reconsideration and potential redesign of the allocation limits.

The ACMA could partially address this complexity through adopting further disaggregation of the products available at auction; that is, by creating products with smaller geographic areas. However, this would increase the need for interference management measures around the geographic boundaries of products, increasing the risk of loss of utility around those boundaries if different bidders obtained geographically adjacent lots. This would have adverse consequences for the efficient use of the

spectrum. Further product disaggregation would make it more difficult for bidders to obtain geographically contiguous areas, and would introduce further complexities into an already complex auction, making bid strategy formulation for bidders and auction implementation by the ACMA more complex.

Before making a provision for the inclusion of spectrum licences in other midband spectrum, outside the 3400 MHz to 3800 MHz band, in counting towards the allocation limits, the ACMA would need to conduct further detailed consideration of the allocation limits to be imposed and aspects of the auction design, supported by further consultations, which would delay the commencement of the auctions.

The ACMA has also considered approaches used by other jurisdictions when allocation limits have been applied in the auction of spectrum in the 3400 MHz to 3800 MHz band. In these instances, a limit only applied within the frequency band being auctioned (see, for example, Belgium's 2022 auction of 3410 MHz to 3800 MHz, Denmark's 2021 auction of 3410 MHz to 3800 MHz, France's 2020 auction of 3490 MHz to 3800 MHz, Sweden's 2021 auction of 3400 MHz to 3720 MHz). Earlier, in 2016 and 2017, the United Kingdom allocated spectrum in the 3410 MHz to 3480 MHz and 3500 MHz to 3580 MHz frequency bands. The allocation limits in this process counted all existing spectrum licences (both in midband spectrum, and elsewhere in the radiofrequency spectrum), and limited each bidder to 37% of currently licensed spectrum.

Taking all these matters into account, the ACMA considered that the efficient use and allocation of the spectrum would be better achieved by imposing allocation limits that count existing spectrum licences in the 3400 MHz to 3800 MHz band (which surround and adjoin the 3.4/3.7 GHz bands, and may be combined with the licences to be issued in those bands to form larger contiguous holdings), than by imposing limits that count spectrum licences in other midband spectrum.

For the purposes of the allocation limits, the ACMA proposed to disregard existing spectrum licences in the 3400 MHz to 3800 MHz band in particular circumstances. Each existing spectrum licence contains one or more 'authorisations' to use a particular spectrum space. Any marginal spectrum space in licences held by a bidder, or by a person in the same relevant group of persons as the bidder, which covers less than 30% of the population of the product the bidder is bidding for, would not be taken into account. One submission generally supported this proposal. One submission proposed the test to be 15% of the population of the product, and another proposed the test to be 50% of the population. The ACMA considers that the 30% test minimises the risk of counterintuitive allocation limits outcomes for bidders, based on existing spectrum licences at the time the determination was made.

The ACMA proposed that third party authorisations under section 68 of the Act not be taken into account for the allocation limits. Submissions on this proposal were divided. The ACMA's view is that taking third party authorisations into account may detract from certainty for bidders at auction as to the application of the allocation limits:

- third party authorisations may be made on different terms and confer different rights on the recipient, when compared to the rights of a spectrum licensee;
- the geographic areas in a third-party authorisation may not align with the product areas for the 3.4/3.7 GHz bands allocation process;
- for third party authorisations which have been subject to regulatory consideration under the *Competition and Consumer Act 2010*, allocation limits may not be the appropriate tool to remediate competition concerns.

On that basis, the allocation limits do not take into account third party authorisations.

In order to prevent bidders from circumventing the allocation limits, the ACMA proposed to prevent bidders in particular relationships with other bidders (**affiliations**) from participating separately in the allocation process, consistently with previous spectrum licence allocation processes. One of the relationships that gives rise to an affiliation is an agreement about the use of the spectrum the subject of the re-allocation declaration. Two submissions argued that the definition of affiliations was too narrow and should consider bidders to be affiliated if they have an agreement for the use of any part of the spectrum in the 3400 MHz to 3800 MHz frequency band, and one argued that the process for checking whether affiliations exist is too burdensome. The ACMA considers the existence of agreements for the use of spectrum in the 3400 MHz to 3800 MHz frequency band (apart from the spectrum which is the subject of the re-allocation declaration) should not make two or more bidders affiliated. This is consistent with the allocation limits policies applied in recent auctions, such as the 850/900 MHz band, 26 GHz band and 3.6 GHz band auctions. Furthermore, inclusion of such agreements would likely exacerbate the complexity that flows from mismatched geographic boundaries in the 3400 MHz to 3800 MHz frequency band. Additionally, there are other regulatory mechanisms that can consider longer-term competition concerns arising from any such agreement, and the ACCC may have the ability to consider these under the *Competition and Consumer Act 2010*.

The ACMA proposed to publish the names of all registered bidders after the eligibility deadline, and the results of both auctions, including the names of unsuccessful bidders, after the end of both auctions. One submission did not agree with this proposal. The ACMA considers it is appropriate to withhold publishing the identity of bidders during the allocation period (which covers both auctions) to maintain the integrity of the allocation process. In the interests of transparency, the ACMA considers it is appropriate to publish the identities of all registered bidders after the conclusion of both auctions when results are published. The draft version of the determination was changed accordingly.

In accordance with subsection 60(14) of the Act, the ACMA consulted the ACCC about whether the determination should include a requirement for the ACMA to give specified information to the ACCC and, if so, the nature of that requirement. A requirement of the relevant kind is set out in section 154 of the determination.

Regulatory impact assessment

Based on information provided by the ACMA, the Office of Impact Analysis has advised that an impact analysis would not be required for the determination because the proposed regulatory changes are minor or machinery in nature – reference number OBPR22-01921.

Separately, the ACMA has certified that the processes and analysis undertaken for the purposes of determining and applying allocation limits to the 3.4/3.7 GHz bands allocation process are equivalent to an impact analysis.

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 with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

Explanatory Statement to the Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023

On 14 July 2022, the ACMA made the re-allocation declaration under the Act. The re-allocation declaration provides that the 3.4/3.7 GHz bands across specified metropolitan and regional areas in Australia are subject to re-allocation by issuing spectrum licences.

Under subsection 60(1) of the Act, the ACMA must determine the procedures for allocating spectrum licences by auction, tender, by allocation for a pre-determined or negotiated price, by direct allocation, or by a combination of two or more of those methods. The determination is made, in substantial part, under that provision. The determination sets out the procedures to be applied in allocating spectrum licences in the 3.4/3.7 GHz bands. The licences will be allocated by a combination of pre-determined price and auction. The ACMA will conduct two sequential auctions – one for the 3.7 GHz band and another for the 3.4 GHz band. Auctions will involve a 3-stage auction process. To the extent that the determination is made under subsection 60(1) of the Act, it is not a disallowable instrument (see paragraph 44(2)(b) of the LA and item 29 in the table set out in 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 3.4/3.7 GHz bands are allocated, by reference to the set price of leftover lots directly allocated to a person and to the winning prices in each auction. To the extent that the determination fixes the spectrum access charges payable, and the timing of such payments, the determination is made under subsection 294(1) of the Act. In relation to the parts of the determination made under subsection 294(1) of the Act, it is a disallowable instrument. Provisions which are made under section 294 of the Act are identified in the determination and in the notes in Attachment A to this explanatory statement for the determination.

Subject to compliance with the allocation limits included in the determination, any person may apply to participate in the 3.4/3.7 GHz bands allocation process 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 determination does not engage any of those rights or freedoms.

Conclusion

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

Notes to the *Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023*

Part 1–Preliminary

Section 1 Name

This section provides for the determination to be cited as the *Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023*.

Section 2 Commencement

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

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provisions of the Act that authorise the making of the determination, namely section 60 and section 294.

Section 4 Interpretation

Subsection 4(1) defines a number of key terms used throughout the determination and identifies where other key terms are defined in the determination. A number of other expressions used in the determination are defined in the Act or other legislation.

Subsection (2) provides that, in the determination, a reference to a part of the spectrum, frequency band or a frequency range includes all frequencies that are greater than but not including the lower frequency, up to and including the higher frequency.

Subsection (3) provides that a reference to time in the determination is a reference to the legal time in Victoria.

Section 5 References to other instruments

This section provides that, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument or writing is a reference to that other instrument or writing as in force or existing from time to time.

Section 6 Giving documents to the ACMA

This section sets out requirements for giving documents to the ACMA, including the approved formats for those documents. These requirements apply to any documents being given to the ACMA for the purpose of the allocation process under the determination.

A person may give a document to the ACMA by delivery to a physical address or by email. If an applicant gives the ACMA an application form by completing the online application webform, the applicant may also give other documents to the ACMA by uploading them using the ACMA auction

Explanatory Statement to the Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023

application portal (online database). Where documents are given by email or uploaded to the ACMA's online database, this section also prescribes the electronic file format that documents being lodged must be in, namely, a Portable Document Format (PDF) for any document, a Word format for any document that is not a statutory declaration, statement or deed, or any other electronic format approved by the auction manager.

This section also provides that when a person gives a deed of financial security to the ACMA, they may do so by providing one or more deeds of financial security and providing a unique identifier should there be more than one deed.

Section 7 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 secretary of that body.

Section 8 Signing or executing documents other than deeds and statutory declarations

This section provides that any document, other than a statutory declaration or a deed, may be signed or executed electronically. It further provides that if the document requires witnessing, it may be witnessed by audio-visual link. The intent of these arrangements is to enable applicants and bidders to complete necessary documents in circumstances where signatories and witnesses may be working remotely and not in a central office location. Applicants and bidders may execute, and have witnessed, statutory declarations and deeds electronically if permitted by the relevant Commonwealth or State and Territory legislation.

Section 9 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.

In relation to the application fee, a person can make payment by BPAY or credit card but only if the application form was given using a webform.

In relation to the eligibility payment, a person can make payment by BPAY or credit card but only if the eligibility nomination form or updated eligibility nomination form was uploaded to the ACMA's online database.

In relation to a winning bidder's balance of the total winning price, the winning bidder can make payment by BPAY or credit card if, under Division 7 of Part 5, the winning bidder has been notified by the ACMA of the bidder's balance of the total winning price.

A person will be taken to have made a payment by the specified deadline provided the ACMA receives the full amount in the ACMA's nominated bank account within 3 working days of the deadline and the 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 ACMA is satisfied the person making the payment has taken all reasonable steps to pay the amount on or before the deadline.

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 interest 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.

Where the ACMA makes or receives a payment under the determination, it does so on behalf of the Commonwealth.

Section 9 relates to the fixing of spectrum access charges set under Division 7 of Part 5 of the determination for the purpose of section 294 of the Act and is therefore disallowable under section 42 of the LA.

Section 10 Giving documents to bidders

This section provides that the auction manager may give information to or notify a bidder by using the auction system. However, there is no obligation for the auction manager to use the auction system to notify or give information to a bidder.

Part 2—Allocation of spectrum licences

Division 1—How spectrum licences will be allocated

Section 11 The allocation process

This section sets out the procedure for the allocation of spectrum licences in the 3.4/3.7 GHz bands. The procedure identifies that the allocation process includes a direct allocation of leftover lots (see Division 1 of Part 5), an auction of the lots of the 3.7 GHz products, and an auction of the lots of the 3.4 GHz products. In addition, as part of the assignment stage of the 3.4 GHz auction, an allocation of any leftover lots that were not directly allocated under Division 1 of Part 5 may occur.

This section also provides that the allocation period is the period commencing on the eligibility deadline and ending immediately after the auction manager provides the results for the allocation process in accordance with section 85 of the determination.

Division 2—General allocation limits

Section 12 Allocation limits

This section sets out that allocation of spectrum licences under the determination must not result in a person exceeding the allocation limit for the area of a metropolitan product or a regional product.

A person exceeds the allocation limit for the area of a metropolitan product or a regional product if:

- the person is allocated a lot or lots of a product under the determination; and
- taking into account existing authorisations in spectrum licences, the person, or the relevant group of persons that includes the person, is authorised to use, in aggregate, more of the relevant spectrum in all or part of the area than the allocation limit for the area.

The allocation limit is 140 MHz of spectrum for the area of a metropolitan product, and 160 MHz of spectrum for the area of a regional product.

This section sets out that the limit takes into account existing authorisations in spectrum licences to operate radiocommunications devices in in the 3400 MHz to 3800 MHz frequency band. For the 3.4 GHz auction, any spectrum allocated to the person in the 3.7 GHz auction is also taken into

account as if the relevant spectrum licences had already been issued as a result of the 3.7 GHz auction.

Authorisations under class licences, apparatus licences or under subsection 68(1) of the Act are disregarded for the purposes of the allocation limits.

Section 13 Applying allocation limits during bidding—assume all bids successful

This section sets out in a table how the allocation limits will be applied when making entries in a pre-bidding round of an auction, and when bidding in a clock round in the primary stage and in a round in the secondary stage of an auction.

Subsection 13(2) provides that leftover lots are disregarded in applying subsection (1).

Section 14 Disregarding existing authorisations with less than 30% population reach

This section is about disregarding existing authorisations that would otherwise be taken into account under subsection 12(4) for the purpose of applying allocation limits for a metropolitan or a regional product. It does not apply to the authorisations assumed to exist by virtue of section 13.

The products defined in the marketing plan have geographic areas (**product areas**) that do not match the geographic areas of the spectrum space represented by authorisations in existing spectrum licences in the 3400 MHz to 3800 MHz frequency band. Many such authorisations overlap, or are completely contained within, the product areas. An area that falls within one or more authorisations (provided it does not cover a boundary of the area of an authorisation) and a product area is an **‘overlap area’**. Where an overlap area only occupies a small proportion of a product area (assessed by reference to population, rather than geographic size), taking account of the relevant authorisations when deciding whether a person can bid on the relevant product without exceeding the allocation limits can result in disproportionate or counter-intuitive results.

Consequently, the ACMA has included rules for disregarding particular authorisations, in relation to a person and a product, for the purposes of the allocation limits.

Subsection 14(2) provides the main rule for disregarding existing authorisations when working out the amount of spectrum a person is authorised to use in an overlap area. An authorisation is to be disregarded in working out the amount of spectrum a person is authorised to use in an overlap area if the overlap area is below the significance threshold for the person and product area within which the overlap area is contained. If a single authorisation covers multiple overlap areas for a person and product area, the authorisation is only disregarded for overlap areas that are below the significance threshold.

Subsection 14(3) provides the calculation method for testing an overlap area against the significance threshold. If there is only one overlap area for a person and product area, the overlap area is below the significance threshold if the population of the overlap area is less than 30% of the population of the product area. If there are multiple overlap areas for a person and product area (**relevant overlap areas**), a particular overlap area (**the test area**) is below the significance threshold if the population of the test area, plus the population of any other relevant overlap area for which the person has equal or greater ‘aggregate existing MHz’ (see below), is less than 30% of the population of the product area.

As mentioned, section 12 provides that a person exceeds the allocation limit for a product area if:

- the person is allocated a lot or lots of a product under the determination; and

- taking into account existing authorisations in spectrum licences, the person, or the relevant group of persons that includes the person, is authorised to use, in aggregate, more of the relevant spectrum in all or part of the area than the allocation limit for the area.

After any authorisations in overlap areas have been disregarded in relation to a person and a product area in accordance with this section, there may still be overlap areas in relation to the person and the product area where authorisations have not been disregarded (**counted overlap areas**). The counted overlap area for which the person is authorised to use the most spectrum in the 3400 MHz to 3800 MHz band is the one that may result in a person exceeding the allocation limit or not.

Subsection 14(4) provides that the total population of a geographic area is to be determined in accordance with the most recent data in the HCIS—List of Population Data document published by the ACMA on its website, as that document existed at the time the determination commenced. The document may be accessed on the ACMA’s website free of charge at www.acma.gov.au.

Subsection 14(5) provides the meaning of *aggregate existing MHz* as the aggregate amount of spectrum (expressed in megahertz) within the 3400 MHz to 3800 MHz frequency band that a person is authorised to use in an area. For the 3.7 GHz auction, a person is considered to be authorised to use any spectrum licence authorisations available to them prior to the allocation process. For the 3.4 GHz auction, a person is considered to be authorised to use any spectrum licence authorisations available to them prior to the allocation process, plus any spectrum licence authorisations to be issued to them based on the results of the 3.7 GHz auction.

Subsections 14(6) and (7) contain other definitions that are needed to work out whether an area is an overlap area for a person and a product.

Section 15 Unused allocation limit

Subsection 15(1) provides that the unused allocation limit for a person for a metropolitan product or a regional product for an auction is the allocation limit for the area of the product, reduced (but not below zero) by the highest amount of spectrum, expressed in megahertz, calculated under subsection (2) for the person for the area of the product, or any part of that area, for the auction.

Subsection 15(2) provides that the amount of spectrum, expressed in megahertz, for a person for an area (which may be all or part of the area of the product) for an auction is the aggregate existing megahertz for the person for the area, calculated immediately before the start of the pre-bidding round of the primary stage of the auction, and disregarding any authorisations that are disregarded by section 14 and any authorisations not taken into account under subsection 12(5).

This section also provides that should section 73 apply to two or more persons, the unused allocation limit for a metropolitan or a regional product for each of those bidders for the 3.4 GHz auction is calculated by starting with the limit calculated for those bidders under subsection (1) for the product and the auction and apportioning that limit between affiliated bidders in a manner determined under section 73.

Section 16 Meaning of *associate* and *relevant group of persons*

This section defines the meaning of *associate* and *relevant group of persons* for the purposes of the allocation limits.

An associate is:

- in relation to a person that is a body corporate – a director or secretary of the body, a related body corporate, a director or secretary of a related body corporate, or an individual who controls at least 15% of the voting power or holds at least 15% of the issued shares in the body;
- in relation to an individual – the individual’s spouse or de facto partner, a body corporate in which the individual controls at least 15% of the voting power or holds at least 15% of the issued shares, or where the individual is a director or secretary of a body corporate – the body corporate and any related body corporate;
- a person that is a party to a relevant agreement with another person for the use or acquisition of a spectrum licence in relation to part of the spectrum in the 3.4/3.7 GHz bands.

The inclusion of parties to a ‘relevant agreement’ as associates covers agreements, arrangements or understandings, whether formal or informal in whole or in part, or whether written or oral in whole or in part, or whether or not having legal or equitable force and whether or not based on legal or equitable rights, where one person (**the first person**) has agreed that another person would use spectrum in their own right that is licensed to the first person, or that relates to the acquisition of a spectrum licence for a part of the spectrum, in the re-allocation declaration for the 3.4/3.7 GHz bands. 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*, or agreements that, to the extent they deal with a part of the spectrum referred to in the reallocation declaration and deal only with spectrum represented by leftover lots, are not included in the meaning of ‘relevant agreement’ for the purposes of the definition of ‘associate’.

A **relevant group of persons** means a person and all associates of that person. A relevant group of persons can also be any two or more groups of that kind that have at least one member in common.

However, an individual is taken not to be a member in common between two or more groups that are comprised of a person (**relevant person**) and the associates of that relevant person where all of the following apply:

- the individual is providing services as a company secretary (**company secretarial services**) to one or more related bodies corporate of the relevant person in each group;
- the individual is providing the company secretarial services through a person or entity that is not a member of any of the groups, and carries on a business for the provision of professional services (including company secretarial services), and has, in the ordinary course of carrying on that business, been separately and independently engaged by an entity within each of the related groups, under a contract or other legally binding arrangement, to provide the company secretarial services;
- the individual is not, otherwise than by reason of providing the company secretarial services, an associate of any of the relevant persons;
- each of the related bodies corporate to which the individual is providing the company secretarial services is incorporated outside Australia.

Section 17 Affiliation between applicants or bidders

This section provides that two applicants or bidders are **affiliated** if the applicants or bidders are in the same relevant group of persons.

Section 18 Information relevant to considering whether applicants or bidders are affiliated

This section sets out the matters that the ACMA must take into account when considering whether an affiliation exists between two or more applicants or bidders, namely, by having regard to certain documents given to the ACMA by applicants and bidders under the determination. The ACMA may also have regard to any other information it considers relevant in determining information about affiliations.

Part 3—Arrangements to be made by the ACMA

Division 1—Key settings and deadlines

Section 19 The ACMA must appoint auction manager

This section provides that the ACMA must appoint a member within the meaning of the ACMA Act, a member of the ACMA staff, or a person whose services are made available to the ACMA, to manage the allocation process (**the auction manager**). This appointment will be made in writing. The auction manager will facilitate and manage the auction conducted under the determination.

In conducting auctions under a determination made under section 60 of the Act, it has been a long-standing practice of the ACMA to appoint, as an auction manager, a member of the ACMA's staff holding a particular role. Generally, this has been the manager of the team responsible for spectrum licence allocation, who is employed at Executive Level 2. The ACMA expects to continue this policy for the allocation process established by the determination.

Section 20 The ACMA must set application fee

This section provides that the ACMA must set an application fee prior to inviting applications for the allocation process. The amount must be paid as part of a valid application.

Section 21 The ACMA must set application deadline and eligibility deadline

This section provides that the ACMA must set an application deadline and an eligibility deadline before it advertises the allocation process.

Before the application deadline, an applicant must submit a completed application form, a completed associates form, a completed deed of acknowledgement and a completed deed of confidentiality to the ACMA, and pay the application fee.

Before the eligibility deadline, an applicant must submit a completed eligibility nomination form to the ACMA, and pay an eligibility payment or give a deed of financial security (or a combination of both) to the ACMA.

Section 22 The ACMA must set lot ratings, eligibility point value and certain prices

This section provides that the ACMA must set the following:

- a lot rating for each product, expressed as a number of eligibility points, that represents an estimated value of each lot of that product;
- the dollar value for each eligibility point;
- the set price for each leftover lot; and
- the starting price for a lot of each product for the first clock round.

Lot ratings are an estimation of the relative value of each lot for the different products on offer, measured in eligibility points. For example, a product with a lot rating of 60 is approximately three

times more valuable than another product with a lot rating of 20. They are an important part of the efficiency of the auction because they encourage truthful bidding and facilitate switching demand between different products. When combined with the activity target (see subsection 105(3)), they reduce the opportunity for strategic bidding by requiring bidders to reveal their demand from the commencement of the auction rather than only near the end (known as bid spiking).

The starting price is equivalent to the reserve price for the lots of each product. It will not be possible within the auction system for an applicant to place a bid for an amount below the starting price. The setting of starting prices and set prices of each leftover lot relates to the fixing of spectrum access charges set under Division 7 of Part 5 of the determination for the purpose of section 294 of the Act. These parts of section 22 are therefore disallowable under section 42 of the LA.

Section 23 The ACMA must approve forms

This section provides that, after setting the amounts in section 22, the ACMA must approve the following forms:

- an application form to apply to participate in the allocation process;
- an associates form for applicants to set out information about their associates;
- a deed of acknowledgement form that includes a statement to the effect that an applicant understands and agrees to be bound by the provisions of the determination;
- a deed of financial security form for securing an applicant's eligibility points;
- a deed of confidentiality form that includes a statement to the effect that the person giving the deed agrees not to disclose confidential information before section 29 ceases to apply to the person;
- an eligibility nomination form for applying for eligibility points and to be directly allocated leftover lots;
- one or more forms for the purposes of section 37, subsection 45(5), and sections 52 and 70 (which are about statutory declarations and statements).

An eligibility nomination form must include a guide to securing eligibility points and a guide to applying to be directly allocated a leftover lot.

Section 24 The ACMA must provide initial auction information to applicants

This section provides that as soon as practicable after the application deadline, the ACMA must give each applicant the following:

- information about using the auction system;
- information about making entries in the auction system during the pre-bidding round for the primary stage and secondary stage of each auction;
- information about making bids in the auction system during the primary stage, secondary stage, and assignment stage of each auction.

Section 25 The ACMA may vary prices and lot ratings

This section provides that the ACMA, not less than 5 working days before the eligibility deadline, may:

- vary a starting price, and if the starting price is varied, vary a lot rating; and/or
- vary a set price for a leftover lot.

If the ACMA varies a starting price, lot rating, or the set price of a leftover lot, the ACMA must:

- set a time and date for a new application deadline, being at least 20 working days after the day the ACMA exercised the power;
- set a time and date for an extended eligibility deadline, being at least 30 working days after the new application deadline;
- approve an updated eligibility nomination form that includes a guide to securing eligibility points and for applying to be directly allocated leftover lots.

This provides an opportunity for existing applicants to update or withdraw their applications, and for new applicants to apply to participate in the allocation process.

The variation of starting prices and set prices for leftover lots relates to Division 7 of Part 5 of the determination for the purposes of section 294 of the Act. Accordingly, these parts of section 25 are disallowable under section 42 of the LA.

The ACMA must publish, as soon as practicable after varying a starting price or set price for a leftover lot, a notice on its website setting out the following:

- if the starting price was varied – the details of the variation of the starting price;
- if a lot rating was varied – the details of the variation of the lot rating;
- if the set price for a leftover lot was varied – the details of the variation of the set price;
- the date and time of the new application deadline;
- the date and time of the extended eligibility deadline.

Division 2–Advertising the allocation process

Section 26 Notice advertising allocation process

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 allocation process. The notice will specify the spectrum to be allocated and will describe in general terms how the allocation process will be conducted. The deadlines for lodging the application form, associates form, associated documentation and paying the application fee (**application deadline**) and eligibility nomination form and eligibility payment and/or deed of financial security (**eligibility deadline**), required to participate in the allocation process, will also be included in the notice. It will also inform prospective applicants how they may obtain the applicant information package (**AIP**) that will explain the allocation process in greater detail.

Subsection (2) provides 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 allocation process, by any method.

Section 27 Applicant information package

The AIP gives prospective participants the key information they need to decide whether to participate in the allocation process. This section specifies the information that the AIP must contain. The AIP includes the determination, the marketing plan and the re-allocation declaration, which are the key instruments that provide the legal basis for the allocation process.

The AIP will also provide information, forms and documentation needed for a person to apply to be registered as a bidder, participate in the allocation process, and be allocated and issued spectrum licences. The AIP also advises that the eligibility deadline is the last time for withdrawal from the allocation process, but notes that the eligibility deadline may be extended.

To assist interested parties to better understand the contents of the AIP, this package will include an auction guide which will set out a summary of how the allocation process will take place as well as other relevant information.

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.

Part 4—Applying to participate

Division 1—Confidentiality

Section 28 *Meaning of confidential information*

The definition of the term *confidential information* forms the basis of the confidentiality rules imposed by Division 1 of Part 4 of the determination. 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, the amount an applicant or bidder is willing to pay for a lot or group of lots in an auction, or the bidder's eligibility points at any time in the allocation period. It also includes documents an applicant or bidder has given to the ACMA for the purpose of the allocation process (e.g. its application form and associates form) and information provided to a bidder by the ACMA for the purposes of participating in an auction. More generally, the definition also covers any information that, if disclosed, could be expected to affect or be capable of affecting an applicant's or bidder's activity prior to or during the allocation process, or that could affect the outcome of the allocation process.

The fact that the bidder applied (or did not apply) to be directly allocated a leftover lot under Division 1 of Part 5 of the determination, or that the bidder was (or was not) directly allocated a leftover lot under that Division, is not confidential information for a bidder.

Section 29 *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, or a contractor 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, 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 (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 make a payment in the allocation process. They also include where an applicant or bidder discloses that they are participating in the allocation process, discloses confidential information to the ACMA, or as authorised by the determination or required by law.

Information that would otherwise fall within the definition of confidential information but is already publicly available, and was not disclosed by a breach of this section, may also be disclosed.

Section 30 Duration of confidentiality obligation

This section sets out when, after the allocation process, the confidentiality obligation for an applicant or bidder, and for a related person or contractor of an applicant or bidder, will end. An applicant or bidder, and their related persons or contractors, will be released from the confidentiality obligation when one of the circumstances set out in this section takes place:

- when the ACMA announces or publishes the allocation results under subsection 92(1); or
- an applicant (who has withdrawn) is notified under section 83 that the applicant's confidentiality obligation has ended.

Section 31 Reporting breach of confidentiality

Given its potential impact on the outcome of the allocation 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 and contractors, to notify the ACMA in writing as soon as possible after becoming aware of a breach of the confidentiality rules, and no later than two working days after becoming aware of the breach. This applies where the applicant or bidder, or related person or contractor, of the applicant or bidder, discloses the confidential information or receives confidential information of another applicant or bidder.

Section 32 Notice of breach of confidentiality

This section applies where the ACMA has reason to believe there has been a breach of the rules regarding the disclosure or reception of confidential information by an applicant or bidder (or a related person or contractor of an applicant or bidder). In such cases, the ACMA must advise the applicant or bidder whose confidential information has been disclosed of the details and ask them to make submissions to the ACMA about the matter. The ACMA must set a deadline for the provision of any submissions that is no more than five working days after the date of the request.

The ACMA is not obliged to tell the applicant or bidder of its belief before the allocation period ends but must do so as soon as practicable after the allocation period ends.

Section 33 Deeds of confidentiality-related persons and contractors

A deed of confidentiality represents an explicit commitment on the part of related persons 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 provides that a deed of confidentiality will be required from related persons, being 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, as well as from contractors who have knowledge of confidential information of 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.

A deed of confidentiality will also not be required from a contractor of an applicant or bidder (who has knowledge of its confidential information), if the contract is for the purposes of:

- obtaining advice relating to the allocation process from the contractor in their professional capacity;
- obtaining finance to make a payment in relation to the allocation process.

Where a related person of an applicant gains knowledge of the applicant's confidential information prior to the application deadline (or a new application deadline, if there is one), a deed of confidentiality from the related person must be submitted to the ACMA before the relevant deadline.

Division 2—Applying to be registered

Section 34 Applying to be registered as a bidder

To take part in the allocation process, 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:

- give the ACMA a completed application form;
- give the ACMA a completed associates form;
- give the ACMA a signed deed of acknowledgement executed by the applicant;
- give the ACMA a signed deed of confidentiality executed by the applicant; and
- pay the application fee.

If an applicant wishes to update their application documents, they may provide an updated, additional or replacement version of the document any time until the application deadline, but not after the application deadline.

Section 35 Application fee not refundable except in certain circumstances

In general, application fees are not refundable, including if the applicant withdraws, or the applicant or bidder is taken to have withdrawn from the allocation process, or is not permitted to make a bid in the 3.4 GHz auction or 3.7 GHz auction.

The application fee paid by an applicant is refundable only if both the ACMA exercises a power under section 25 of the determination (that is, the ACMA varies key auction settings) and an applicant withdraws its application before the extended eligibility deadline by giving the ACMA notice in writing. If this applies, the ACMA must refund the application fee no later than six months after the applicant withdraws its application.

Section 36 Applicants to notify the ACMA if application information incorrect

An applicant is required to immediately notify the ACMA when they become aware that any of the information provided to the ACMA is incorrect or has become incorrect. The auction manager may correct information in an application if the auction manager is satisfied that the information is incorrect should the information contain a clerical error or obvious mistake or omission.

Section 37 Applicant to make statutory declaration about affiliation

To ensure that affiliated applicants do not participate in the allocation process as separate bidders, the ACMA has included procedures to identify affiliated applicants before the commencement of the allocation process. This provision sets out the requirements that will assist the ACMA to identify whether any two or more applicants are affiliated.

After the application deadline, the ACMA must provide each applicant with a list of all other applicants, and the persons those applicants have identified as their associates. The information distributed will be based on details provided in application and associates forms.

The ACMA will ask each applicant to identify from the list provided by the ACMA whether they are affiliated with any other applicant. Under this section, applicants must then make a statutory declaration to the ACMA stating whether they are affiliated with another applicant and, if so, giving details of that affiliation. The ACMA will state a deadline by which the statutory declaration must be received, which will be at least 10 working days after the date of the ACMA's request.

Section 38 Failure to give statutory declaration about affiliation

This section provides if an applicant fails to provide a statutory declaration in accordance with section 37, the applicant is taken to have withdrawn from the allocation process. The ACMA must tell the applicant in writing if the applicant's application is withdrawn.

Division 3—Eligibility points and leftover lots

Section 39 Applying for eligibility points and to be allocated leftover lots

After the application deadline and no later than the eligibility deadline, an applicant must give the ACMA a completed eligibility nomination form which specifies:

- the number of eligibility points the applicant seeks to have immediately before the start of the 3.7 GHz auction; and
- whether the applicant, if eligible, is applying to be directly allocated a leftover lot.

An applicant who has given the ACMA a completed eligibility nomination form before the eligibility deadline may also provide an updated, additional or replacement version of the document at any time up to the eligibility deadline but not after the eligibility deadline.

The applicant is taken to have withdrawn their application if they fail to provide a completed eligibility form by the eligibility deadline. Should this be the case, the ACMA will tell the applicant in writing.

Section 40 Who is eligible to apply for a leftover lot

This section sets out who is eligible to apply for a leftover lot. A person is eligible to apply to be directly allocated a leftover lot if the person is the adjacent licensee identified for that lot as provided in Schedule 3 to the marketing plan, or a related body corporate of the adjacent licensee.

Section 41 Requirement to secure eligibility points

This section describes how an applicant secures the eligibility points specified in its eligibility nomination form.

An applicant secures its eligibility points by making an eligibility payment, or providing a deed of financial security, or a combination of both. The required amount for an applicant to secure eligibility

points is the sum of the product of the number of eligibility points and the dollar value of those points. For an applicant applying to be directly allocated a leftover lot, an applicant must also pay 10% of the set price of the leftover lot.

If a deed of financial security is given to the ACMA via email or uploaded to the ACMA's online database before the relevant eligibility deadline, the original deed must be received by the ACMA no later than three working days after the eligibility deadline (or if the ACMA agrees to a later time, the agreed time).

A deed of financial security must be executed by an authorised deposit-taking institution, a person authorised to carry on a business in Australia as an insurer under the *Insurance Act 1973*, or a Lloyd's underwriter authorised to carry on insurance business under Part VII the *Insurance Act 1973*. Should a deed of financial security be executed by a person acting under a power of attorney for a body corporate, the applicant must provide a copy of the power of the attorney with the deed.

Section 42 Number of eligibility points secured

This section sets out the number of eligibility points an applicant has secured immediately before the start of the 3.7 GHz auction.

If the applicant gives the ACMA a completed eligibility nomination form (or updated eligibility nomination form) and makes an eligibility payment or gives a deed of financial security (or combination of both) for the required amount, the applicant will secure the amount of eligibility points it specified in its completed form.

If the applicant makes an eligibility payment or gives a deed of financial security (or combination of both) for an amount less than the required amount, the ACMA must notify the applicant in writing that they have not provided the required amount and the applicant must, before the eligibility or extended eligibility deadline (if there is one), or no later than three working days after the date of the notice (whichever is later), make a payment or provided a deed of financial security for the remainder of the required amount.

If the applicant does not comply with the notice, the applicant will secure a reduced number of eligibility points. The number of eligibility points secured will take into account whether a person applied to be directly allocated a leftover lot.

If the applicant did not apply to be directly allocated a leftover lot, the number of eligibility points secured by the applicant is worked out by:

- determining the incomplete amount of the payment as a proportion of the amount required under subsection 41(3); and
- multiplying that proportion by the number of eligibility points specified in the eligibility nomination form; and
- rounding the result down to the nearest integer.

If the applicant applied to be directly allocated a leftover lot, then the number of eligibility points secured by the applicant is worked out as follows:

- if the incomplete amount equals or falls short of 10% of the set price of the leftover lots applied for – zero; or
- if the incomplete amount exceeds 10% of the set price of the leftover lots applied for:
 - determining the amount of the excess as a proportion of the required amount; and

- multiplying that proportion by the number of eligibility points specified in the eligibility nomination form; and
- rounding that result down to the nearest integer.

Section 43 Consequence of failing to secure eligibility points

This section sets out the consequences for an applicant who fails to secure eligibility points.

If an applicant who applied to be directly allocated a leftover lot does not secure eligibility points, the applicant is not entitled to bid during the primary stage or the secondary stage of either the 3.7 GHz auction or the 3.4 GHz auction. If an applicant who did not apply to be directly allocated a leftover lot does not secure eligibility points, the applicant is taken to have withdrawn its application.

An applicant has failed to secure eligibility points if the applicant does not give the ACMA a completed eligibility nomination form (or updated eligibility nomination form), the applicant does not make an eligibility payment or give a deed of financial security (or both) for the required amount, if the applicant emails or uploads a deed of financial security but does not give the ACMA the original within the required timeframe, if the applicant is required to, but does not, give the ACMA a copy of the power of attorney under which a deed of financial security was executed, or if the ACMA is not satisfied that the person executing a deed of financial security is one of the classes of persons specified in subsection 41(5). In these instances, if the applicant has applied to be directly allocated a leftover lot, the applicant is not entitled to bid during the primary or the secondary stage of either the 3.7 GHz auction or the 3.4 GHz auction. If the applicant did not apply to be directly allocated a leftover lot, then the applicant is taken to have withdrawn its application.

If an applicant makes an eligibility payment or gives a deed of financial security, and the applicant does not comply with a notice given under subsection 42(3) (where an incomplete payment or financial security amount is given to secure the desired number of points, and the ACMA notifies the applicant that the remainder of the required amount is required to secure those points), and the number of points that may be given to the applicant is less than one (as calculated under subsection 42(5) or (6)), then:

- if the applicant has applied to be directly allocated a leftover lot, the applicant is not entitled to bid during the primary or the secondary stage of either the 3.7 GHz auction or the 3.4 GHz auction; or
- if the applicant did not apply to be directly allocated a leftover lot, then the applicant is taken to have withdrawn their application.

The ACMA must notify the relevant applicant in writing about the fact that:

- the applicant is not entitled to bid during the primary or secondary stage of either auction; or
- the applicant is taken to have withdrawn its application.

Division 4—Dealing with affiliations

Section 44 Procedure if ACMA satisfied applicants are 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 some options that they may use to resolve any affiliation so as to enable their participation in the allocation process.

If the ACMA is satisfied that two or more applicants are affiliated, the ACMA must notify the affiliated applicants and:

- tell them the basis on which the ACMA is satisfied that the applicants are affiliated; and
- notify the applicants that to participate in the allocation process:
 - each affiliated applicant must withdraw its application; and a new applicant must submit an application; or
 - each affiliated applicant, but one, must withdraw its application.

The affiliated applicants must notify the ACMA within 10 working days which option they have decided to take. If the affiliated applicants do not notify the ACMA within those 10 working days, each of the affiliated applicants is taken to have withdrawn its application. If some of the affiliated applicants withdraw their applications but more than one fails to withdraw, then the remaining affiliated applicants will be taken to have withdrawn their applications.

The ACMA is required to tell the applicant in writing if their application is taken to be withdrawn.

Section 45 Dealing with affiliation–new applicant

This section provides an opportunity for affiliated applicants to participate in the allocation process as a single bidding entity in a manner that will ensure that the allocation limits are not exceeded. It allows one or all of a group of affiliated applicants to make a new application as a single applicant. It sets out the process and timeframe for lodging a new application. A new application made under this section must be accompanied by payment of an additional application fee.

New applications can only be lodged by a body corporate whose only members are one or more of the group of affiliated applicants. New applicants will have 10 working days from the time that they are notified of being an affiliated applicant to submit a completed application form, associates form, a deed of acknowledgement executed by the new applicant and a deed of confidentiality executed by the new applicant, and pay the application fee to the ACMA. After receiving the relevant documents and the application fee, the ACMA will give each applicant, including the new applicant, updated details of all other applicants who have not withdrawn and their associates. For an application to be valid, the new applicant must give the ACMA a statutory declaration declaring that the new applicant is not affiliated with any other applicant mentioned in the updated information within three working days of being provided updated applicant and associates information by the ACMA.

The new applicant must, no later than the eligibility deadline or extended eligibility deadline (if there is one), whichever is the case (or if the ACMA agrees to a later time, the agreed time) give the ACMA a completed eligibility nomination form or a completed updated eligibility nomination form (as appropriate).

The applicant will be taken to have withdrawn its application if the applicant fails to give the ACMA a completed eligibility nomination form (or updated eligibility nomination form, if required) or secure the eligibility points by making an eligibility payment, providing a deed of financial security, or a combination of both. If the ACMA is satisfied that the new applicant is affiliated with one or more other applicants before the new applicant is registered as a bidder, then all relevant applicants will be taken to have withdrawn their applications.

Section 46 Initial auction information provided to new applicants

After an application is made under section 45, the ACMA must give the new applicant information about using the auction system, information about making entries in the auction system during the

pre-bidding round for the primary stage or secondary stage of an auction, and information about making bids in the auction system during the primary stage, secondary stage, and assignment stage of an auction. This is typically provided through a bidder user manual.

Division 5–Dealing with changes to prices or lot ratings

Section 47 Notice about updating application documents

This section requires the ACMA, if it varies a starting price or the set price of a leftover lot, as soon as possible after setting the new application deadline and extended eligibility deadline to notify all applicants in writing of the requirements to give the ACMA an updated eligibility nomination form and secure eligibility points.

Section 48 Updating eligibility nomination form and financial security

This section sets out the requirements in relation to an existing applicant after the ACMA notified them of the requirements to give the ACMA an updated eligibility nomination form and secure eligibility points.

This section provides that the ACMA must give each applicant a copy of the updated eligibility nomination form as soon as practicable after setting the new application deadline and the extended eligibility deadline.

The applicant must give the ACMA a completed updated eligibility nomination form that specifies the number of eligibility points the applicant wishes to have immediately before the start of the 3.7 GHz auction, and if the applicant applies for direct allocation of a leftover lot, before the extended eligibility deadline.

If the applicant fails to do so, the applicant’s application is taken to have been withdrawn.

Section 49 Notice inviting additional applicants to the auction

This section requires the ACMA, as soon as practicable after it has set a new application deadline and extended eligibility deadline, to publish a notice inviting persons who are not already applicants to apply to take part in the allocation process. The notice must state the following:

- the new application deadline;
- the extended eligibility deadline;
- that applications can only be withdrawn before the extended eligibility deadline;
- the electronic address to obtain the AIP.

The ACMA must publish another notice if any matters mentioned in the notice change. The ACMA is also able to publish the information in the notice by any other method in addition to the online notice.

Section 50 Applying to be registered–additional applicants

This section sets out how a person who is not already an applicant may apply to participate in the auction, if the ACMA has varied a starting price or the set price of a leftover lot. This includes any applicant who has already withdrawn, or was taken to have withdrawn, its application.

In order to apply to participate in the allocation process, a person is required to do the following before the new application deadline:

- give a completed application form;

- give a completed associates form;
- give a deed of acknowledgement executed by the applicant;
- give a deed of confidentiality executed by the applicant;
- pay the application fee.

After the new application deadline, and before the extended eligibility deadline, an applicant under this section must give the ACMA a completed updated eligibility nomination form that specifies the number of eligibility points the applicant wishes to have immediately before the start of the 3.7 GHz auction, and whether they are applying for direct allocation of a leftover lot.

If the applicant wishes to provide an updated, additional or replacement document to the ACMA under this section, the applicant may do so before the relevant deadline.

The applicant will be taken to have withdrawn its application if the applicant fails to give the ACMA a completed updated eligibility nomination form by the extended eligibility deadline.

Section 51 Initial auction information for additional applicants

After an application is made under section 50, the ACMA must give the applicant information about using the auction system, information about making entries in the auction system during the pre-bidding round of the primary stage and secondary stage of an auction, and information about making bids in the auction system during the primary stage, secondary stage, and assignment stage of an auction. This is typically provided through a bidder user manual.

Section 52 Statutory declarations and affiliations

This section describes how the ACMA checks that an additional applicant is not affiliated with existing applicants or other additional applicants for the purposes of enforcing the allocation limits.

If the ACMA receives an application from an additional applicant, it must, after the new application deadline:

- give each applicant updated details about the identity of all other applicants and their associates;
- ask each applicant to make a statutory declaration stating whether it is affiliated with another applicant and, if so, the details of that affiliation.

The ACMA must set a deadline for receiving the statutory declaration, which is at least 10 working days after the date of the request. If an applicant does not make the statutory declaration by the deadline, it is taken to have withdrawn its application.

If the ACMA is satisfied that two or more applicants are affiliated, it will apply the procedures in sections 44 and 45.

Division 6—Withdrawal of applications

Section 53 Withdrawal of application

This section describes how and when an applicant may withdraw from the auction, and the consequences of withdrawing an application.

This section provides that an applicant may withdraw their application before the eligibility deadline or extended eligibility deadline (if there is one) by giving the ACMA a notice in writing.

An applicant is unable to withdraw their application after the eligibility deadline or extended eligibility deadline (if there is one). Subject to subsection 50(1), an applicant is unable to be re-admitted to the allocation process after withdrawing its application, or being taken to have withdrawn its application, by the ACMA.

If the applicant withdraws its application or is taken to have withdrawn its application, and the applicant paid all or part of an eligibility payment, then the ACMA must refund the amount paid within a specified period, provided for in subsection 83(2).

Division 7—Registration of bidders

Section 54 Registration process

This section sets the procedure for bidders to be registered. It also describes the information that the ACMA will provide to bidders once they are registered.

This section provides that the ACMA can only register a person as a bidder if:

- the eligibility deadline or extended eligibility deadline (if there is one) has passed;
- the person has made a valid application pursuant to the determination;
- the person has not withdrawn, or has not been taken to have withdrawn, its application; and
- (except where the person has applied to be directly allocated a leftover lot) the person has made an eligibility payment or provided a deed of financial security (or combination of both).

After the eligibility deadline or extended eligibility deadline (if there is one) has passed, the ACMA must notify the person in writing that they are registered as a bidder and can participate in the allocation process, and provide the following:

- a copy of the information recorded on the register for the bidder;
- an email address and telephone number of the ACMA available for use by the bidder;
- information about the leftover lots that have been directly allocated, including to whom;
- information about accessing the auction system;
- information about how to make an entry and a bid by alternative methods if the bidder is unable to make an entry or a bid using the auction system.

Section 55 Register of bidders

This section requires the ACMA to maintain an electronic register of bidders and lists the information the register must contain for each bidder. It also requires the ACMA to keep the register up to date.

Section 56 Bidders to notify the ACMA if register incorrect

The section creates an ongoing responsibility for a bidder to tell the ACMA if any of the information about the bidder or its associates on the register of bidders is incorrect. If any information is incorrect, the bidder must immediately give the ACMA the correct information. If the auction manager is satisfied that the information on the register is incorrect, such as it contains a clerical error, an obvious mistake, or information that contains an omission, then the auction manager may correct the register.

Part 5—Allocation procedures

Division 1—Allocation of leftover lots

Section 57 Allocation of leftover lots

This section sets out the procedures for directly allocating a leftover lot. If a person, who is eligible to apply, applies to be directly allocated a leftover lot, the leftover lot will be allocated to the person immediately after the eligibility deadline or extended eligibility deadline (if there is one). The person will be considered to be a winning bidder in the 3.4 GHz auction.

Division 2—General procedures for both auctions

Section 58 Auction stages

This section provides that the 3.7 GHz auction and the 3.4 GHz auction will each consist of a primary stage, secondary stage (if required), and an assignment stage.

The primary stage is made up of 3 components:

- a pre-bidding round for bidders to enter their start demand for lots of each product (which is capable of being a winning bid, and therefore may result in the allocation of those lots to the bidder) and to elect whether to adopt the MSR of 2 lots for lots of each product;
- one or more clock rounds to make bids on lots of a product and to receive results of that clock round;
- the determination of the final posted demands as a result of the final clock round, the lots of each product allocated to a primary winner, and of the primary price after all clock rounds are completed.

The secondary stage is made up of 3 components:

- a pre-bidding round for eligible bidders to enter a single price for each residual lot of a product they intend to bid for (which is capable of being a winning bid, and therefore may result in the allocation of those residual lots to the bidder);
- one or more rounds to make bids for any residual lots of a product, and the results of that round;
- the determination of the winning final high bids for any residual lot of a product allocated to a secondary winner, and of the associated secondary price, after all rounds for the secondary stage are completed.

The assignment stage is made up of 3 components:

- one or more assignment rounds for determining the assignment of frequency ranges;
- for the 3.4 GHz auction, the allocation of any leftover lots not directly allocated to a person;
- the determination of winning assignment bids and the total assignment price for each assignment winner after all assignment rounds are completed.

Section 59 Procedures if only one bidder

The ACMA will know if there is only one bidder after the end of the pre-bidding round of the primary stage of an auction.

This section provides that if there is only one bidder in an auction, the ACMA will notify the bidder as soon as reasonably practicable after the pre-bidding round of the primary stage that it is the only bidder. The procedures for allocating lots of the products are as follows:

- the bid increment percentage for the first clock round of the primary stage is zero percent, meaning the ‘starting price’ is the same as the ‘clock price’; and

- there will be one notional clock round in the primary stage, during which the bidder is treated as having made maintain bids for the bidder's start demand of each product, as set out in the bidder's entries in the pre-bidding round. Whilst this notional clock round is not conducted via the auction system, as the bidder cannot take steps to enter any contrary bid, it is still legally a clock round; and
- the assignment stage will be conducted as soon as possible after the primary stage to enable the bidder to indicate the frequency ranges the bidder wishes to have assigned to them.

Section 60 Auction rules

This section sets out which divisions of the determination are relevant to each of the auction stages for each auction.

- for the primary stage, Division 1 of Part 6;
- for the secondary stage, Division 2 of Part 6;
- for the assignment stage, Division 3 of Part 6.

Section 61 Auction manager's discretion to accept entries and bids

This section addresses circumstances that may arise during the allocation process that prevent a bidder from being able to use the auction system to submit a bid for a round in the primary stage, secondary stage or assignment stage, or to make an entry in the pre-bidding round of the primary stage or the secondary stage. For example, a sudden power blackout may cut a bidder's computer access to the auction system.

Subsection (1) gives the auction manager the discretion to permit an entry or bid to be submitted by an alternative method. After they are registered, bidders will receive information about how they can submit an entry or bid if they are unable to use the auction system.

Subsection (2) gives the auction manager the discretion to permit an entry or bid to be submitted after the pre-bidding round, clock round, round in the secondary stage, or an assignment round has ended. However, the auction manager must be satisfied that technical or communication problems prevented the bidder from doing so during the relevant round. Entries or bids that have been submitted in this way will be regarded as valid entries or bids made during the round. An entry or bid cannot be submitted after information about the outcome of the pre-bidding round, clock round or round has been given to bidders.

Section 62 Action that auction manager may take in exceptional circumstances

Exceptional circumstances may arise that affect an auction. If the auction manager is satisfied that these have arisen, a range of actions may be taken. These actions include correcting entries made in the pre-bidding round of an auction's primary or secondary stages, the results of an auction round after it has ended, or information received by a bidder after the relevant auction round. The auction manager may also stop the pre-bidding rounds, the current clock round, round of the secondary stage or assignment round and restart it, cancel the results of one or more rounds and restart the auction from the point before those rounds, cancel the results of all rounds in the primary, secondary or assignment stages and restart the auction from the first round of a specific stage, or suspend the auction.

Examples of exceptional circumstances that could permit the auction manager to take discretionary action under this provision include significant technical difficulty with the auction system or a breach

of the confidentiality obligation. These examples are not exhaustive and do not preclude other circumstances from being regarded as exceptional.

These actions could occur in a pre-bidding round of a primary or secondary stage, or a clock round in a primary stage, or a round in a secondary stage or an assignment round in an assignment stage.

Section 63 Security of the auctions

This section requires bidders to ensure that the security of the auction system is maintained. A bidder must keep secure any information and items provided to the bidder for the purpose of accessing the auction system. If such items are lost or stolen, a bidder must immediately notify the ACMA.

Section 64 Advising winning bidders of their auction results

This section outlines the information the auction manager must tell each winning bidder after the end of the assignment stage of an auction.

Section 65 Meaning of *winning bidder* and *winning price*

This section defines who is a *winning bidder*. It also defines *winning price* for each auction, and how it is calculated for a winning bidder.

A winning price is the total of the bidder's primary price for an auction (if any), secondary price for an auction (if any), total assignment price for an auction (if any) and, for the 3.4 GHz auction, the set price for any leftover lot directly allocated to the bidder.

This section also applies to spectrum access charges payable under section 294 of the Act. As such, this section relates to Division 7 of Part 5 of the determination and is disallowable under section 42 of the LA.

Division 3—Dealing with affiliations during the allocation period

Section 66 Affiliation between bidders during allocation period not permitted

This section states that a bidder must not be affiliated with another bidder during the allocation period. If the ACMA is satisfied there is a breach of this provision, then the ACMA may take action under section 155.

Section 67 Requirement to report affiliation

This section requires a bidder to immediately tell the ACMA in writing if the bidder believes that it may be affiliated with another bidder, noting the identity of the affiliated bidders and giving details of the affiliation.

Section 68 Allocation process continues despite possible affiliation

This section states that if the ACMA becomes aware during the allocation period that two or more bidders may be affiliated, the allocation process is to continue, and the bidders may continue to participate in the process.

Section 69 Consideration of affiliation

This section requires that if the ACMA has reason to believe that two or more bidders are affiliated during the allocation period, the ACMA must notify the bidders in writing and inform them of the basis on which the ACMA believes the affiliation to exist.

If a bidder provides information to the ACMA and the ACMA does not consider an affiliation to exist, then the ACMA must notify the bidder in writing of its view.

Section 70 Statements about affiliations during an auction

The section provides that if the ACMA has notified bidders that it has reason to believe the bidders are affiliated, and this notice occurred during the allocation period but before the start of the assignment stage of the 3.4 GHz auction, then the ACMA must give each notified bidder details about the identity of all other notified bidders and ask each notified bidder to make a statement about whether the bidder is an affiliate of another notified bidder and giving details about the affiliation.

If the time when the ACMA gave the notice was:

- for the 3.7 GHz auction—after the start of the allocation period but before the end of the primary stage (if there is no secondary stage) or the secondary stage of the auction; or
- for the 3.4 GHz auction—after the start of the pre-bidding round of the primary stage and before the end of the primary stage (if there is no secondary stage) or the secondary stage of the auction;

then the ACMA must give each primary and secondary winner in the auction details about other winners in the particular auction (and for the 3.4 GHz auction, primary and secondary winners in the 3.7 GHz auction) and ask each such winner to make a statement about whether they are an affiliate of any other winner and identifying the other winner and giving details of the affiliation.

The ACMA must state a deadline of at least 10 working days after the date of the request before a statement must be received by the ACMA. The notified person must give the ACMA a statement by the deadline.

Section 71 Notification of affiliation during allocation period

This section provides that if the ACMA is satisfied that two or more bidders (whether or not primary winners or secondary winners) are affiliated, and the affiliation time was during the allocation period, but before the start of the assignment stage of the 3.4 GHz auction, then the ACMA must notify those bidders and tell them the basis on which the ACMA is satisfied the bidders are affiliated.

Section 72 Consequence of affiliation before assignment stage

This section applies in relation to an auction where:

- the ACMA notified two or more affiliated persons under section 71 before the assignment stage of the auction; and
- either:
 - the two or more of those affiliated persons are primary winners or secondary winners in the auction; or
 - for the 3.4 GHz auction—of the affiliated persons, at least one is a primary winner or secondary winner in the 3.7 GHz auction and at least one is a primary winner or secondary winner in the 3.4 GHz auction; and
- the ACMA became satisfied that the persons were affiliated:
 - for the 3.7 GHz auction—after the start of the allocation period but before the end of the primary stage (if there is no secondary stage) or the secondary stage of the auction; or

- for the 3.4 GHz auction—after the start of the pre-bidding round of the primary stage and before the end of the primary stage (if there is no secondary stage) or the secondary stage of the auction; and
- the allocation of spectrum licences to the affiliated persons who are primary winners or secondary winners in the auction for lots of each metropolitan product and regional product allocated to those persons in the primary stage or secondary stage of the auction would result in a person exceeding the allocation limit for the area of any product.

In these circumstances, the ACMA must not allocate spectrum licences to the affiliated persons who are primary winners or secondary winners in the affected auction that would exceed the allocation limits.

If it is possible for one or more lots of a product to be allocated to one or more affiliated persons who are primary winners or secondary winners in the auction without a person exceeding an allocation limit, then those affiliated persons may give a direction in writing to the ACMA specifying how lots are to be allocated between them up to the allocation limits. The direction must be given to the ACMA jointly by those affiliated persons within five working days after those persons received notice of their affiliation from the ACMA under section 71. If the direction complies with the requirements in the section, lots will be allocated in accordance with the direction. If the direction does not comply with those requirements, the ACMA will allocate lots of the product to those affiliated persons at its discretion up to the allocation limits.

The winning bidder who is allocated at least one lot of a product after this section has been applied must pay the full balance of the total winning price of all lots that the winning bidder won in the primary and secondary stages of the auction, despite not being allocated all those lots as a result of this section.

The balance of the total winning price is a component of the spectrum access charge, imposed in relation to the spectrum licence to be issued to winning bidders. As such, this section relates to Division 7 of Part 5 of the determination and is disallowable under section 42 of the LA.

Section 73 Consequence of affiliation for 3.4 GHz auction – apportionment of unused allocation limit

This section is applicable if the ACMA has notified affiliated persons under section 71 and the affiliation time was before the start of the pre-bidding round of the primary stage of the 3.4 GHz auction. It ensures that the affiliated persons will not be able to bid during the 3.4 GHz auction in a manner that results in a person exceeding the allocation limits.

The affiliated persons may give the ACMA a direction specifying how to apportion the ‘unused allocation limit’ for each metropolitan or regional product that is available in the 3.4 GHz auction between the affiliated persons. The unused allocation limit for a product is, broadly, how many lots of a product a person could be allocated before the person would exceed the allocation limits. The direction must be given jointly by the affiliated persons and within 5 working days after receiving notification under section 71 from the ACMA. If the ACMA receives a direction that complies with the requirements of the section, then the ACMA will apportion the unused allocation limit as directed. If the ACMA does not receive a direction that complies with those requirements, then it will apportion the unused allocation limit between the affiliated bidders at its discretion.

Affiliated persons are authorised to disclose confidential information to each other for the purpose of deciding how to direct the ACMA to apportion the unused allocation limit.

Division 4—Procedures relating to the 3.7 GHz auction

Section 74 Preparation for bidding

This section requires the ACMA to give each bidder an opportunity to trial the auction system before the 3.7 GHz auction commences.

Section 75 Scheduling of auction rounds

This section provides that rounds of the 3.7 GHz auction are to be scheduled in accordance with the determination, and that the first clock round of the primary stage of the 3.7 GHz auction must start on the date and time set by the auction manager.

Section 76 Pre-bidding round and first clock round of 3.7 GHz auction

This section outlines the requirement that, after the later of the eligibility deadline or extended eligibility deadline, if there is one, the auction manager must set the start date and start time of the first clock round of the primary stage of the 3.7 GHz auction. The auction manager must also set the start date and start time of the pre-bidding round, which must fall within the 48 hours before the start date and start time of the first clock round of the primary stage. The pre-bidding round must last for at least three hours. At least 10 working days before the start of the pre-bidding round, the auction manager must notify each bidder of the start date, start time, and duration of the pre-bidding round and first clock round of the primary stage of the 3.7 GHz auction.

This section also outlines that the ACMA may vary the start date and start time of the first clock round of the primary stage. This may occur not less than two working days before the start date and time of the pre-bidding round, and must establish a date that is at least 10 working days later than the original date and time set by the auction manager. The ACMA must also set a minimum three hour period that falls within the 48 hours before the varied start date and time as the pre-bidding round. If the ACMA does so, the auction manager must notify each bidder accordingly.

Section 77 Results of the 3.7 GHz auction

This section sets out the information the ACMA must provide to each bidder after the end of the 3.7 GHz auction and before the start of the pre bidding round of the primary stage of the 3.4 GHz auction.

Division 5—Procedures relating to the 3.4 GHz auction

Section 78 Recalculation of unused allocation limit

This section sets out that the ACMA must determine the unused allocation limit for each metropolitan product or regional product available in the 3.4 GHz auction for a bidder who is a primary winner or secondary winner for a lot of a product in the 3.7 GHz auction, or is affiliated with one of those winners, ahead of the 3.4 GHz auction. The ACMA must notify the bidder of its unused allocated limit for each such product for the 3.4 GHz auction at least three working days before the start of the pre-bidding round of the primary stage of the 3.4 GHz auction.

Section 79 Recalculation of eligibility points

This section provides that after the end of the 3.7 GHz auction, the ACMA must calculate each primary winner's or secondary winner's eligibility points at the time immediately before the start of the 3.4 GHz auction. The ACMA must notify the bidder of the number of eligibility points calculated at least three working days before the start of the pre-bidding round of the 3.4 GHz auction's primary

stage. A primary or secondary winner in the 3.7 GHz auction will have their secured eligibility points reduced by the lot rating of all the lots allocated to the winner in the 3.7 GHz auction. If a person was not allocated any lots in the 3.7 GHz auction, they will start the 3.4 GHz auction with all the eligibility points they secured before the 3.7 GHz auction.

Section 80 Updating the register

This section requires the ACMA to update the register of bidders with each bidder's eligibility points and unused allocation limit for each product available in the 3.4 GHz auction, before the start of the 3.4 GHz auction. These amounts may have changed, depending upon whether the bidder was allocated any lots in the 3.7 GHz auction, or whether the bidder has become affiliated with another bidder.

Section 81 Scheduling of auction rounds

This section requires the rounds of the 3.4 GHz auction to be scheduled in accordance with the determination. It specifies that the first clock round of the primary stage of the 3.4 GHz auction starts on the date and time for that clock round set by the auction manager.

Section 82 Pre-bidding round and first clock round of 3.4 GHz auction

This section outlines the requirement that, after the completion of the assignment stage of the 3.7 GHz auction, the auction manager must set the start date and start time of the first clock round of the primary stage of the 3.4 GHz auction. The auction manager must also set the start date and start time of the pre-bidding round, which must fall within the 48 hours before the start date and start time of the first clock round of the primary stage. The pre-bidding round must last for at least three hours. This section provides that the period between the end of the 3.7 GHz auction and the start of the 3.4 GHz auction is at least five working days. The auction manager must notify each bidder of these matters at least five working days before the start of the first clock round of the primary stage of the 3.4 GHz auction.

Division 6—Confirmation of results of allocation process

Section 83 Notice and refunds to withdrawn applicants

This section requires the ACMA to notify each applicant that withdrew or was taken to have withdrawn their application, that their confidentiality obligation has ended. This must be done as soon as practicable after the end of the allocation period. This section also provides that withdrawn applicants who have made eligibility payments will have these payments refunded no later than 6 months after this notification, except where the ACMA has decided to retain the eligibility payment under section 155 due to a breach of the auction rules.

Section 84 Notice and refunds to unsuccessful bidders

This section sets out that the ACMA must, as soon as practicable after the 3.4 GHz auction, notify each unsuccessful bidder that they have not won any spectrum in either of the 3.4 GHz auction or 3.7 GHz auction, and that their confidentiality obligation under section 29 will end when the ACMA publishes the auction results under subsection 92(1).

The ACMA must refund any eligibility payment made by the unsuccessful bidder no later than 6 months after notifying the bidder that they are unsuccessful, unless the ACMA has decided to retain the eligibility payment under section 155 due to a breach of the auction rules.

Section 85 Advising all bidders of results of allocation process

This section describes what results of the allocation process are given by the auction manager to bidders.

After the completion of the assignment stage of the 3.4 GHz auction, the auction manager must inform all bidders in writing of the following:

- the names of all winning bidders for each auction;
- the names of any unsuccessful bidders in the auctions;
- the frequency ranges in relation to the lots allocated under the determination;
- the winning price paid, or to be paid, by each winning bidder in relation to each auction;
- the posted price for the lots of each product in the final clock round in the primary stage of each auction;
- the residual price of each residual lot in the secondary stage (if any) of each auction.

The ACMA must not provide bidders any further information about the results of the auctions unless all bidders agree in writing, or unless required to by law.

Division 7—Payment and issue of licences

Division 7 of Part 5 is made under section 294 of the Act, and is disallowable under section 42 of the LA.

Section 86 Spectrum access charge

This section fixes the spectrum access charge payable by a bidder for the issue of a spectrum licence. The spectrum access charge is the sum of the bidder's winning price in the 3.7 GHz auction and the bidder's winning price in the 3.4 GHz auction (which includes the set price of any leftover lots directly allocated to the bidder).

Section 87 Balance of the total winning price

This section provides that, for a winning bidder, the *balance of the total winning price* is the spectrum access charge calculated for the bidder under section 86 minus any eligibility payment made by the bidder.

Section 88 Sufficient eligibility payment—issue of spectrum licence without further payment

This section applies to a winning bidder who made an eligibility payment before the eligibility deadline or extended eligibility deadline.

If its eligibility payment is greater than the spectrum access charge payable (that is, its balance of the total winning price is less than zero), the ACMA must refund that part of the eligibility payment that is in excess of the spectrum access charge. It must provide the refund within six months after giving the notice under section 85. The bidder is entitled to be issued a single spectrum licence for all parts of the spectrum allocated to the bidder in the 3.4 GHz auction, and a single spectrum licence for all parts of the spectrum allocated to the bidder in the 3.7 GHz auction, without further payment.

If the balance of the total winning price for a winning bidder is equal to zero, the bidder is entitled to be issued a single spectrum licence for all parts of the spectrum allocated to the bidder in the 3.4 GHz auction, and a single spectrum licence for all parts of the spectrum allocated to the bidder in the 3.7 GHz auction, without further payment.

This section does not apply if the ACMA decides to retain an eligibility payment under section 155.

Section 89 Payment of balance of total winning price

This section provides that if a winning bidder's balance of the total winning price is greater than zero, the ACMA must notify the winning bidder in writing of the following information:

- the bidder's winning prices for each of the 3.4 GHz auction and the 3.7 GHz auction;
- the total of the winning prices for each of the auctions (i.e., the spectrum access charge);
- the effect on the balance of the total winning price of any eligibility payments;
- that the balance of the total winning price is to be paid in full;
- the date by which the balance of the total winning price must be paid to the ACMA.

The ACMA must provide at least 20 working days to the winning bidder for payment of the balance of the total winning price. If the ACMA becomes aware of a material error in the initial notice, then the ACMA must provide the winning bidder with a revised notice.

Section 90 Issue of spectrum licences after payment of balance

This section provides that if a winning bidder pays the balance of the total winning price in accordance with the relevant notice given by the ACMA, then the winning bidder is entitled to be issued spectrum licences for the parts of the spectrum allocated to the winning bidder.

Section 91 Default

This section specifies the consequences if a winning bidder does not pay the balance of the total winning price in accordance with the notice under subsection 89(1), which are as follows:

- spectrum licences are not allocated to the winning bidder under the determination;
- the allocation of spectrum licences to other bidders will not be affected;
- the spectrum that would have been included in the spectrum licence allocated to the bidder is treated as unallocated under section 150.

Section 92 Publication of allocation results

This section provides that, after the end of the allocation period, the ACMA must announce or publish:

- the names of the winning bidders in each auction;
- the spectrum allocated to each winning bidder;
- the winning price paid, or to be paid, by each winning bidder in relation to each auction;
- the posted price of the lots of each product in the final clock round in the primary stage of each auction;
- the residual price of each residual lot in the secondary stage (if any) of each auction;
- the names of each bidder who is not a winning bidder in either auction.

Before the ACMA publishes this information, the auction manager must notify each winning bidder that the ACMA will announce the above information and that the winning bidder's confidentiality obligations will cease when the information is announced or published. The ACMA will not publish any further auction results information unless all winning bidders agree in writing, or unless required by law.

Part 6–Auction rules

Division 1–Rules for the primary stage

Division 1 of Part 6 of the determination sets out the rules for the primary stage of an auction.

Subdivision A–Application

Section 93 Application of Division

This section provides that Division 1 applies to the 3.7 GHz auction and the 3.4 GHz auction, and that the following lots are available in the primary stage of an auction:

- all 3.7 GHz products for the 3.7 GHz auction;
- all 3.4 GHz products for the 3.4 GHz auction.

Subdivision B–Arrangements for primary stage

Section 94 Bid increment percentage for primary stage

Before the first clock round, the auction manager must set a percentage (**the bid increment percentage**) for the lots of each product to be applied in calculating the clock price for the lots of a product in a clock round. The auction manager must tell each bidder the bid increment percentage before the first clock round. The bid increment percentage may be different for different products and can be different for the same product between different clock rounds.

The auction manager can change the bid increment percentage at any time during the primary stage. Before doing so, the auction manager must tell each bidder (other than a bidder who did not enter a positive start demand for any product) of the proposed change and seek comments within a timeframe (being not less than one hour), and consider comments received during that time. The auction manager must notify each such bidder before the change takes effect. The auction manager may use the ‘Announcements’ feature of the auction system to communicate any of this information. This means all registered bidders, regardless of whether they have entered a positive start demand for any product, will see the announcements, but they may not all be consulted.

Section 95 Eligibility requirement percentage for primary stage

Before the first clock round, the auction manager must set a percentage (**the eligibility requirement percentage**) to be applied in calculating the activity target during each clock round. The percentage may be different for different clock rounds

Each bidder must be notified before the first clock round of the percentage.

The auction manager can change the eligibility requirement percentage at any time during the primary stage. Before doing this, the auction manager must tell each bidder who is participating in the primary stage of the auction (other than a bidder who did not enter a positive start demand for any product) of the proposed change and seek comments within a timeframe (being not less than one hour), and consider comments received during that time. The auction manager must notify each such bidder before the change takes effect. The auction manager may use the ‘Announcements’ feature of the auction system to communicate any of this information. This means all registered bidders, regardless of whether they have entered a positive start demand for any product, will see the announcements, but they may not all be consulted.

Section 96 Scheduling of clock rounds

This section sets out the requirements the auction manager must meet in scheduling the clock rounds of the primary stage. The auction manager may, at any time, modify the schedule of clock rounds. If this occurs, the auction manager must tell each bidder of the change as soon as practicable.

Section 97 Recess days

This section provides that the auction manager may declare a day to be a recess day (whether or not the day is a working day) on which there will be no clock rounds. Before declaring a recess day, the auction manager must seek comments from bidders on the proposal and take into account any comments received. The auction manager must notify each bidder in writing of the recess.

Section 98 Entries by auction manager before pre-bidding round

This section requires the auction manager to enter into the auction system, before the pre-bidding round, each bidders' eligibility points and unused allocation limit for each product for the auction.

Section 99 Information available for clock rounds of the primary stage

Before the start time of each clock round, the auction manager must provide the following information to each bidder using the auction system:

- the start time of the clock round;
- the end time of the clock round;
- the opening price and clock price for the lots of each product available for bidding in the clock round;
- for each product, the number of lots calculated by subtracting the supply of the product from the sum of the number of lots in the start demands for the product for the clock round of all bidders (which might be zero, or a negative number);
- the eligibility points of the bidder for the clock round;
- the bid increment percentage for each product for the clock round;
- the eligibility requirement percentage for the clock round;
- any other information that the auction manager considers necessary or convenient to conduct the primary stage of the auction.

At the end of each clock round, the auction manager must provide the following information to each bidder through the auction system:

- the posted prices for the lots of each product in the clock round;
- the posted demands of the bidder for the lots of each product in the clock round;
- any other information that the auction manager considers necessary or convenient to conduct the primary stage of the auction.

Subdivision C–Bidding in the primary stage

Section 100 Availability of lots in clock rounds of the primary stage

This section provides that each lot of a product is available for bidding in the first clock round, and in each subsequent clock round, until the final clock round. Bidding does not close on a single product but rather all products close together in the final clock round. Each bidder may make a bid on lots of a product available for bidding during a clock round subject to the general rules about making bids set out in section 102 and the bid validity rules set out in section 103.

Section 101 Pre-bidding round

After the auction manager has entered in the auction system each bidders' eligibility points and unused allocation limit, during the pre-bidding round, a bidder may enter in the auction system the number of lots of each product for its start demand for the first clock round, and whether it elects to adopt for the primary stage the MSR on a product by product basis.

The number of lots of a product entered in the auction system is valid if:

- the number of lots entered does not exceed the bidder's unused allocation limit for the auction for the product; and
- if the bidder elected to adopt the MSR for the product—the number of lots entered is not one; and
- the number of lots entered does not exceed the supply of the lots of the product; and
- taking into account the number of lots entered in the auction system by the bidder for all products:
 - the sum of the lot ratings for those lots equals or is less than the bidder's eligibility points just before the start of the pre-bidding round; and
 - the number of lots entered would not result in a person exceeding the allocation limit for the area of any product.

If the number of lots of a product recorded in the auction system for a bidder is valid, that number is the bidder's start demand for lots of the product for the first clock round.

Entries made in the pre-bidding round are effectively binding on bidders. Because of the way bids are processed (in particular, decrease bids), it is possible that the bidder's start demand for lots of a product for the first clock round will be the bidder's posted demand for that product in the final clock round, resulting (after assignment of frequencies) in the bidder being allocated a spectrum licence for the lots of a product in its start demand. This can be the case even if the bidder made only decrease bids for lots of the product in all the clock rounds, as those decrease bids may all be rejected in accordance with the determination.

After the end of the pre-bidding round, the auction manager must provide the following information to each bidder using the auction system:

- the bidder's start demands for the lots of each product for the first clock round;
- for each product, whether the bidder elected to adopt the MSR for the primary stage;
- the bidder's eligibility points at the time immediately after the pre-bidding round;
- for each product, the difference between the sum of the number of lots in the start demand for the first clock round for all bidders and the supply of the product.

Section 102 Making bids

This section describes general rules for primary stage bidding.

A bidder is entitled to bid in a clock round if the bidder has eligibility points remaining for the clock round.

A bidder cannot make more than one bid for the lots of each product in each clock round. A bid for a product in a clock round of the primary stage consists of a request for a number of lots of the product in the clock round (expressed as a total number of lots requested, rather than an increase or decrease

to the start demand) and a price entered by the bidder in relation to each lot of the product for the clock round.

Except where subsection 61(1) or 61(2) applies, a bidder's bid is taken to have been made in a clock round when the bid has passed data validation checks that are performed by the auction system.

A bidder may change, delete or replace a bid in the auction system as often as desired during a clock round, subject to data validation checks that are performed by the auction system. The bid for the lots of a product that will be treated as binding for the bidder is the bid in the auction system at the end time of the clock round.

Section 103 Validity of bids

This section outlines specific rules in relation to bid validity during the primary stage.

A bid in a clock round is valid if the bid is received by the auction system between the start time and end time of the clock round and meets the conditions of a maintain bid, increase bid, or decrease bid.

In a clock round, a maintain bid for a product is valid if:

- it is a request for a number of lots; and
- the number of lots requested is the same as the bidder's start demand; and
- the bid price is the same as the clock price.

In a clock round, an increase bid for a product is valid if:

- it is a request for a number of lots; and
- the number of lots requested:
 - is greater than the bidder's start demand; and
 - does not cause the bidder to exceed its unused allocation limit for the product for the auction; and
 - does not exceed the supply of lots of the product; and
 - does not result in the bidder exceeding the allocation limit for any product (as an increase bid for one product may cause a bidder to exceed the allocation limit for a geographically overlapping product); and
 - is at least two, if the bidder elected to adopt the MSR for the product; and
- the bid price is not less than the opening price and not greater than the clock price, and is a multiple of \$100; and
- the sum of the lot ratings for all the lots of all products requested does not exceed the bidder's eligibility points for the clock round.

In a clock round, a decrease bid for a product is valid if:

- it is a request for a number of lots; and
- the number of lots requested is less than the bidder's start demand, but is not less than zero; and
- the bid price is not less than the opening price and not greater than the clock price, and is a multiple of \$100; and
- if the bidder elected to adopt the MSR, the number requested is not one.

A deemed bid occurs if a bidder does not make a bid, or does not make a valid bid, for lots of a product in a clock round. If this occurs, a bidder is taken to have made:

- a maintain bid, if the bidder's start demand for the product is zero lots; or
- a decrease bid for zero lots at the opening price, if the bidder's start demand for the product is one or more lots.

Section 104 Eligibility points

This section sets out a bidder's eligibility points at various times in the allocation period. Eligibility points are lost after a clock round if they are not used during the clock round (see section 105). After the end of the 3.7 GHz auction, a person's eligibility points will be recalculated to be the total number of eligibility points secured, less the lot rating of each lot allocated to the person during the primary or secondary stage of the 3.7 GHz auction.

Section 105 Loss of eligibility points for inactivity

This section sets out how a bidder's eligibility points for the next clock round is calculated if the bidder does not meet the activity target for the current clock round, and how that impacts its bidding in future clock rounds.

A bidder's eligibility points for a clock round will be reduced if the bidder does not meet its activity target in a clock round.

The activity target for a bidder during a clock round means the figure obtained by multiplying the amount of the bidder's eligibility points for that clock round by the eligibility requirement percentage set by the auction manager for that clock round, rounded down to the nearest integer.

Subsection 105(2) sets out how to calculate eligibility points for the next clock round, based on the higher of two amounts, being either the eligibility points for their placed bids or eligibility points for their processed bids in the current clock round, and dividing those amounts by the eligibility requirement percentage.

In future clock rounds, bidders may only bid in such a way that they do not exceed their eligibility points for that clock round.

Subdivision D—Processing of bids

Section 106 Processing of bids

This section provides the procedures for processing bids in the primary stage.

A maintain bid made by a bidder in a clock round is applied in full.

An increase or decrease bid made by a bidder in a clock round is processed by the processing algorithm, as set out in sections 107, 108 and 109.

Section 107 Processing algorithm

This section sets out the processing algorithm, by which the bids in the primary stage are processed in the auction system. After the end time of each clock round, the auction system's processing algorithm processes the bids made during the round by all bidders for all products. It performs the following functions:

- processes the increase and decrease bids for the clock round;

- calculates the posted demand for each bidder for the lots of each product for the clock round;
- calculates the posted price for each lot of a product for the clock round.

The processing algorithm processes the increase bids and decrease bids according to the principles set out in subsection 107(2). The processing algorithm sorts the bids into a queue, in ascending order, based on the price point of each bid, and then processes each bid sequentially. If a bid is applied in full, it is removed from the queue; if it is applied in part, then the applied part is removed from the queue and the unapplied part remains in the queue; if it is rejected, it remains in the queue. If a bid is rejected, the processing algorithm moves to the next bid in the queue; otherwise, it returns to the start of the queue. The processing algorithm stops processing bids when either all bids have been processed, or a bid is rejected and there is no further bid in the queue.

If an increase bid or a decrease bid for the clock round was processed in part at a time in the processing of bids, then a reference in Division 1 to an increase or decrease bid includes a reference to the unapplied part of the earlier bid that was left in its place in the queue.

Section 107 also defines some terms used in Division 1.

The **price point** for a bid for a lot of a product for a clock round is the difference between the bid price and the opening price, divided by the difference between the clock price and the opening price.

Demand change affects whether a bid can be applied in full, applied in part or rejected. The **demand change** is:

- for an increase bid—the increase in lots above the start demand for the clock round bid; or
- for a decrease bid—the decrease in lots below the start demand for the clock round bid; or
- for part of an increase bid or a decrease bid that is unapplied and that is treated at a time in the processing of bids as an increase bid or decrease bid—the number of lots of the extent to which the bid is unapplied.

A posted demand is the ‘result’ of the clock round for a bidder for lots of a product – it becomes the bidder’s start demand for the next clock round. The **posted demand** for a bidder for lots of a product for a clock round is:

- for a bidder who made a maintain bid for the lots of the product in the clock round—the start demand of the bidder for the lots of the product for that clock round; or
- for a bidder who made an increase bid or a decrease bid for the lots of the product in the clock round—the bidder’s provisional posted demand for the lots of the product calculated under section 108 or 109 after the processing algorithm stops processing bids for the clock round.

The **excess demand** for lots of a product for a clock round means the number of lots calculated by subtracting the supply of the product from the sum of the number of lots in the posted demands of all bidders for the clock round. When excess demand for lots of all products is zero or less after a clock round, that is the final clock round of the primary stage.

The posted price for lots of a product after a clock round becomes the opening price for lots of that product in the next clock round. What the posted price is depends on the excess demand for the product for the clock round, and whether a decrease bid was applied during the round. Depending on these factors, the **posted price** can be one of the clock price, the opening price, or the highest bid price at which a decrease bid was applied (whether in full or in part) during the clock round.

Section 108 Applying an increase bid

This section describes whether, and how, an increase bid is applied in full, applied in part, or rejected.

Available activity

The main test for determining whether an increase bid for a product by a bidder is applied in full, applied in part or rejected is whether the bidder has sufficient ‘available activity’, immediately before the bid is processed. The **available activity** of a bidder, immediately before an increase bid for the product is to be processed, is calculated by:

- starting with the bidder’s eligibility points at the start of the clock round; and
- subtracting the sum of the lot ratings of all the lots in the bidder’s start demand for each product at the start of the clock round; and
- for each of the bidder’s decrease bids for a product for the clock round that has already been applied in full or in part, adding the result from multiplying the lot rating by the number of lots applied; and
- for each of the bidder’s increase bids for a product for the clock round that has already been applied in full or in part, subtracting the result from multiplying the lot rating by the number of lots applied; and
- dividing the result from the previous point by the lot rating for a lot of the current product and rounding the result down to the nearest integer.

Available limit

A secondary test for determining whether an increase bid by a bidder is applied in full, applied in part or rejected is whether the bidder has sufficient ‘available limit’, immediately before the bid is processed. The **available limit** of a bidder, immediately before an increase bid for the product is to be processed, is the maximum number of lots of the product the bidder could bid for at that time without exceeding an allocation limit in an area.

Increase bid rejected

If the number of lots in either or both of the available activity and the available limit is zero, the increase bid is rejected and the bidder’s **provisional posted demand** for the lots of the product after the bid is processed is the sum, in number of lots, of:

- the bidder’s start demand for the product for the clock round; and
- if the increase bid is the unapplied part of an earlier increase bid that was applied in part – the number of lots of the product in the part of the earlier bid that was already applied.

Increase bid applied in full

If the lesser of the available activity and the available limit, immediately before the increase bid is processed, equals or exceeds the demand change for the increase bid, then the increase bid is applied in full. The bidder’s **provisional posted demand** for the lots of the product after the bid is processed is the sum, in number of lots, of:

- the bidder’s start demand for the product for the clock round; and
- the demand change for the increase bid, and
- the number of lots of the product in the part of the earlier bid that was already applied (if the increase bid is the unapplied part of an earlier increase bid that was applied in part).

Increase bid applied in part

If, immediately before the increase bid is processed, the demand change for the increase bid exceeds the lesser of the available activity and the available limit, then the current bid is applied in part to the extent of the number of lots in the lesser of the available activity and the available limit. To the extent of the number of lots that comprises the excess, the increase bid is unapplied. The bidder's **provisional posted demand** for the lots of the product after the bid is processed is the sum, in number of lots, of:

- the bidder's start demand for the product in the clock round; and
- the number of lots in the part of the bid just applied; and
- the number of lots of the product in the applied part of the earlier bid (if the increase bid is the unapplied part of an earlier increase bid that was applied in part).

MSR – increase bid rejected

If the bidder elected to adopt the MSR for the product and the **provisional posted demand** calculated in accordance with provisions for applying an increase bid (in full or in part) would have been one lot of the product, then the increase bid is rejected and the bidder's **provisional posted demand** for the lots of that product is zero.

Section 109 Applying a decrease bid

This section describes whether, and how, a decrease bid is applied in full, applied in part, or rejected.

Provisional excess demand

The main test for determining whether a decrease bid for a product by a bidder is applied in full, applied in part or rejected is based on the 'provisional excess demand' that exists for the product immediately before the bid is processed. The **provisional excess demand**, immediately before a decrease bid for the product for a clock round is processed, is the sum of:

- the number of lots calculated by subtracting the supply of the product from the sum of the number of lots in the start demands for the product for the clock round of all bidders; and
- the difference between the number of lots in the increase and decrease bids for the product that have already been applied in full or in part;

less the demand change for the decrease bid about to be processed.

It is a measure of whether demand would exceed supply of lots of the product if the decrease bid were applied in full.

Decrease bid applied in full

If the provisional excess demand for a product, immediately before the decrease bid is processed, is equal to or greater than zero, the decrease bid is applied in full and the bidder's **provisional posted demand** for the lots of the product is equal to:

- the bidder's start demand for the product for the clock round; less
- the demand change for the current bid; less
- the number of lots of the product in the part of the earlier bid that was already applied (if the decrease bid is the unapplied part of an earlier decrease bid that was applied in part).

Decrease bid rejected

If the provisional excess demand for a product, immediately before the decrease bid is processed, is less than zero and the absolute value of the provisional excess demand equals or exceeds the demand change for the decrease bid, then the decrease bid is rejected and the bidder's **provisional posted demand** for the lots of the product is equal to the difference between:

- the bidder's start demand for the product for the clock round; and
- the number of lots of the product in the part of the earlier bid that was already applied (if the decrease bid is the unapplied part of an earlier decrease bid that was applied in part).

Decrease bid applied in part

If the provisional excess demand for a product, immediately before the decrease bid is processed, is less than zero and the demand change for the decrease bid exceeds the absolute value of the provisional excess demand then the decrease bid is applied in part to the extent of the number of lots in excess, and unapplied to the extent of the number of lots equal to the absolute value of the provisional excess demand. Effectively, the decrease bid is applied only to the extent necessary to bring the provisional excess demand to zero lots. The bidder's **provisional posted demand** for the lots of the product is equal to:

- the bidder's start demand for the product for the clock round; less
- the number of lots applied in part; less
- the number of lots of the product in the part of the earlier bid that was already applied (if the decrease bid is a part of an earlier decrease bid that was applied in part).

MSR – decrease bid applied in full

If the bidder elected to adopt the MSR for the product and the provisional posted demand calculated in accordance with applying the bid in part would have been one lot of the product, then the current bid is applied in full and the bidder's **provisional posted demand** for the lots of that product is zero.

Subdivision E—Bringing the primary stage to an end

Section 110 End of clock rounds

This section provides that the clock rounds of the primary stage end immediately after the final clock round.

A clock round of the primary stage is the final clock round if, for every product, the total number of lots in the posted demands of all bidders after the clock round is no more than the supply.

If the number of lots in a bidder's posted demand for a product for the final clock round is at least one lot, the bidder is a **primary winner** for that number of lots of the product.

Section 111 Allocation of lots to primary winners

This section provides that the primary winner for a number of lots of a product is allocated that number of lots of the product.

Section 112 Determination of primary prices

This section sets out how to determine the primary price to be paid by each primary winner. The primary price is a component of the spectrum access charge imposed in relation to the spectrum

licences to be issued to winning bidders. As such, this section relates to Division 7 of Part 5 of the Determination, which fixes the spectrum access charges for issuing spectrum licences, for the purpose of section 294 of the Act. This section is therefore disallowable under section 42 of the LA.

The **primary price** to be paid by a primary winner for all lots of all products allocated to the primary winner in the primary stage is the sum of the posted prices for each of those lots for the final clock round.

Section 113 Results of the primary stage

After the primary winners and primary prices are determined, the auction manager must tell each primary winner, in writing, the total number of lots of each product allocated to the primary winner, the total posted price for the lots of each product allocated to the primary winner, and the primary price to be paid by the primary winner for all lots allocated to the primary winner.

After the primary winners and primary prices are determined, the auction manager must tell all bidders, in writing, the total number of primary winners and the total number of lots of each product allocated in the primary stage.

Section 114 End of the primary stage

Immediately after the auction manager provides the results of the primary stage, the auction must tell each bidder, in writing, that the primary stage is completed.

Division 2 – Rules for the secondary stage

Division 2 of Part 6 of the Determination sets out the rules for the secondary stage of an auction.

The secondary stage uses an online version of the English Open Outcry format. The starting prices in the secondary stage are the same as in the primary stage. The allocation limits continue to apply in the secondary stage. To minimise strategic bidding, if a bidder has selected an MSR for a product and does not obtain at least that number of lots for that product during the primary stage, they will not be permitted to bid on the residual lot of that product in the secondary stage. This is to deter bidders from reducing demand during the primary stage in order to attempt to obtain an amount of spectrum less than its MSR at a lower price in the secondary stage.

Eligibility points are not applicable to the secondary stage since there is no activity rule or ability to switch demand between products.

Subdivision A–Application

Section 115 Application of Division

Division 2 of Part 6 applies if, after the final clock round of the primary stage of an auction, there is a residual lot for at least one product and there is at least one bidder who could make a valid bid for that residual lot.

If, after the final clock round of the primary stage of an auction, the total of the posted demands of all bidders for lots of a product falls short of the supply of the product for that final clock round and the shortfall is one lot, then that shortfall is a **residual lot** of the product.

If Division 2 of Part 6 applies to an auction, each residual lot that satisfies this section is available in the secondary stage of the auction.

Subdivision B—Arrangements for secondary stage

Section 116 Bid increment percentage for secondary stage

Before the first round of the secondary stage, the auction manager must set a percentage (**the bid increment percentage**) for each residual lot as a percentage of the starting price for the lot for the first round of the secondary stage, and of the specified price for the lot in any other round of the secondary stage. This bid increment percentage affects the minimum bid that can be made by a bidder for a lot in a round, if the bidder wishes to make bids in later rounds.

The auction manager must notify the bid increment percentage for each residual lot to each bidder to whom residual lots are available for bidding for the first round of the secondary stage before the first round of the secondary stage. The bid increment percentage may vary between lots and may vary between rounds.

The auction manager can change the bid increment percentage at any time during the secondary stage. Before doing so, the auction manager must tell each bidder to whom residual lots are available for bidding of the proposed change and seek comments within a timeframe (being not less than one hour), and consider comments received during that time. The auction manager must notify each bidder to whom residual lots are available for bidding before the change takes effect.

Section 117 Scheduling of rounds

This section sets out the requirements the auction manager must meet in scheduling the rounds of the secondary stage. The auction manager must allow at least 24 hours between the end of the primary stage and the start of the secondary stage. The pre-bidding round must be a period of at least 30 minutes and must conclude at least 30 minutes before the start of the first round of the secondary stage. The rounds of the secondary stage must start and end between 9.00 am and 5.00 pm on working days, other than recess days. All other scheduling is at the auction manager's discretion. The auction manager may, at any time, modify the schedule of rounds. If this occurs, the auction manager must tell each bidder to whom residual lots are available for bidding as soon as practicable.

Section 118 Recess days

The auction manager may declare a day to be a recess day (whether or not the day is a working day).

Before declaring a recess day, the auction manager must seek comments from bidders to whom residual lots are available for bidding on the proposal and take into account any comments received. The auction manager must tell each such bidder in writing of the recess.

Section 119 Entries by auction manager before pre-bidding round

The auction manager must enter in the auction system the residual lots that are available for each bidder to whom residual lots are available for bidding in the secondary stage before the pre-bidding round.

Section 120 Information available during rounds of the secondary stage

This section provides that the auction manager must provide the following information to particular bidders, via the auction system, before the start of each round in the secondary stage:

- to a bidder to whom at least one residual lot is available for bidding in the pre-bidding round:
 - for the pre-bidding round—the starting price that will apply to the lot in the first round;

- for each round—the start time and end time of the round.
- to a bidder who made a valid bid on a residual lot during the pre-bidding round:
 - before the first round:
 - the specified price that will apply to the lot in the round; and
 - the starting price for the lot;
 - for each round other than the first round:
 - the specified price that will apply to the lot in the round; and
 - the specified price that applied to that lot in the previous round; and
 - before each round—the total number of bidders who could bid on the lot in the round, taking into account sections 122 and 123; and
 - after the final round for bids on the lot—the residual price for the lot.

The auction manager must provide the following information after the end of each round using the auction system:

- the bids made by the bidder during the round;
- the residual price for a lot if the bidder is a secondary winner;
- any other information the auction manager considers necessary or convenient to conduct the secondary stage of the auction.

Subdivision C—Bidding in the secondary stage

Section 121 Availability of lots in rounds of the secondary stage

Each residual lot that is available in the secondary stage of an auction is available for bidding in the first round of the secondary stage, and in each later round of the secondary stage, until the final round for that lot.

Each bidder may make a bid on a lot of a product that is available to the bidder for bidding during a round.

Bidders do not require eligibility points to bid in the secondary stage.

Section 122 Availability of lots to particular bidders

This section ensures a bidder does not exceed the allocation limits in the secondary stage.

This section provides that a residual lot is available to a bidder for bidding in the secondary stage if the bidder could bid on the lot without exceeding the allocation limit for the area of any product and either:

- the bidder did not elect to adopt the MSR for lots of that product; or
- the bidder was allocated at least two lots of that product in the primary stage if the bidder adopted the MSR for lots of that product.

The section sets out the process for a bidder to select which lots should be available to it to bid on in the secondary stage, if bidding on residual lots of two separate products would cause a person to exceed the allocation limit in an area.

The auction manager, before the pre-bidding round of the secondary stage, must notify the bidder that the allocation limits affect the bidder in the secondary stage, advise the bidder of the relevant products, and specify a time and date, before the pre-bidding round of the secondary stage, by which the bidder must nominate which of the relevant residual lots the bidder intends to bid on.

The bidder can nominate the residual lots that are to be available for bidding by the bidder in the secondary stage. The bidder can nominate any combination of the relevant residual lots, so long as that combination (if allocated to the bidder) would not cause the bidder to exceed an allocation limit.

If the bidder makes a valid nomination within the specified time, then only the nominated lots are available to the bidder for bidding during the secondary stage.

If the bidder fails to make a valid nomination by the specified time, none of the relevant residual lots are available to the bidder for bidding.

Section 123 Exclusion from further participation

This section provides the circumstances where a bidder will be excluded from further participation in the secondary stage of an auction. They are as follows:

- if a bidder does not make a valid pre-bid on a lot in the pre-bidding round of the secondary stage, the bidder cannot make a bid on that lot in any round of the secondary stage;
- if a bidder does not make a valid bid on a lot in a round of the secondary stage, the bidder cannot make a bid on that lot in a later round of the secondary stage;
- a bidder cannot make a bid on a lot in a round of the secondary stage if, in an earlier round of the secondary stage:
 - the bidder made an exit bid on the lot; and
 - two or more other bidders made a continue bid on the lot.

Section 124 Pre-bidding round

This section provides that after the auction manager has entered in the auction system the residual lots that are available for each bidder for bidding in the secondary stage, the bidder may use the auction system to indicate each residual lot of a product that the bidder intends to bid for in the first round, and a price at which the bidder intends to bid for the residual lot.

If a bidder indicates the bidder intends to bid on a residual lot in the pre-bidding round, the bidder has made a *pre-bid* for a residual lot.

A pre-bid is valid if it is on a lot that is available to the bidder during the secondary stage and the price entered is at least the starting price for the lot of the product. Entries made in the pre-bidding round take effect as bids in the first round. Accordingly, a valid pre-bid for a residual lot may be the winning bid for the lot. If only one valid pre-bid is entered for the lot, then the bidder who entered that pre-bid is the secondary winner for the lot.

The auction manager must provide to each bidder the pre-bids entered by that bidder in the auction system after the pre-bidding round has ended.

Section 125 Making bids

This section provides that a bidder is entitled to bid in a round of the secondary stage unless there are no residual lots available in the round on which the bidder could make a valid bid.

Bidders bid on a single residual lot, consisting of a request for the lot and a price entered by the bidder in relation to the lot. A bidder's bid is taken to have been made in a round of the secondary stage when the bid has passed data validation checks that are performed by the auction system, except where the auction manager permits a bid to be made other than by using the auction system or where the auction manager permits a bid to be made after a round of the secondary stage has ended.

A bidder is able to change, delete or replace a bid in the auction system during a round as often as they desire, subject to data validation checks. The bid for a lot is treated as binding for a bidder if the bid is in the auction system at the end time of the round.

A valid pre-bid for a residual lot made in the pre-bidding round is treated as a bid made for that lot in the first round of the secondary stage, at the price entered in making the pre-bid, subject to any other valid bid made by the bidder on the lot in the round (unless the valid pre-bid was the only valid pre-bid for the lot in the pre-bidding round). If there is only one valid pre-bid, that pre-bid is treated as a bid and that bid is the final high bid.

Section 126 Validity of bids

This section prescribes the requirements for a bid in the secondary stage to be valid.

A bid in a round of the secondary stage is valid if:

- the bid is received by the auction system between the start time and end time of the round (except where the auction manager allows a bid to be made after the end time); and
- the bid is on a lot that is available to the bidder for bidding in the secondary stage; and
- the bidder is not excluded from bidding on the lot; and
- the price entered by the bidder is not less than the starting price for a first round bid or the specified price of the lot in the previous round for a later round and is a multiple of \$100.

This section also defines some important terms for the secondary stage.

A valid bid on a lot in a round of the secondary stage is a **continue bid** if the price entered by the bidder equals or exceeds the specified price of the lot for that round.

A valid bid on a lot in a round of the secondary stage is an **exit bid** if the price entered by the bidder is less than the specified price of the lot for that round.

The **specified price** for a lot for a round in the secondary stage is the sum of the following, rounded up to the nearest hundred:

- either:
 - for the first round—the starting price for the lot; or
 - for any other round in the secondary stage—the specified price for the lot for the previous round; and
- the bid increment percentage for the lot multiplied by the price applicable to the round under paragraph 126(4)(a).

Section 127 Carry forward of certain continue bids

This section applies if a bidder makes a continue bid on a lot in a round of the secondary stage and the price (**advance price**) entered by the bidder in making the bid equals or exceeds the specified price for the lot for the round.

In any later round of the secondary stage in which the advance price equals or exceeds the specified price, the bid is treated as a continue bid on the lot.

In the first round of the secondary stage in which the advance price is less than the specified price, the bid is treated as an exit bid.

Continue bids and exit bids are subject to any other bid made by the bidder on the lot in the round.

Subdivision D—Bringing the secondary stage to an end

Section 128 Conclusion of bidding on a lot

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

The **final round** for a lot is the first round where:

- there is only one valid bid made for the lot; or
- one or more exit bids, and no more than one continue bid, are made on the lot; or
- no valid bids are made on the lot.

The **secondary winner** for a lot for which the final round has occurred is the bidder who made the final high bid on the lot.

The **final high bid** is the bid that wins the lot. The final high bid for a lot in the secondary stage is whichever of the following applies:

- if one valid bid was made on the lot in the final round for the lot – that bid is the final high bid;
- if one continue bid was made on the lot in the final round for the lot (regardless of how many exit bids were made in that round) – that continue bid is the final high bid;
- if all of the following apply:
 - no continue bid was made on the lot in the final round for the lot; and
 - two or more exit bids were made on the lot in the final round for the lot; and
 - one of those exit bids (**the high exit bid**) was greater than each of the other exit bids; the high exit bid is the final high bid;
- if all of the following apply:
 - no continue bid was made on the lot in the final round for the lot; and
 - two or more exit bids were made on the lot in the final round for the lot; and
 - two of those exit bids (**the joint high exit bid**) were for the same price and were greater than each of the other exit bids; the joint high exit bid selected through a pseudorandom process is the final high bid.

If no valid bids are made on the lot in any round, the lot is not allocated in the secondary stage.

Section 129 End of rounds of the secondary stage

The secondary stage will end immediately after the last round of the secondary stage, unless a pseudorandom selection needs to be undertaken after the last round of the secondary stage.

A round in the secondary stage is the **last round of the secondary stage** if the round was a round for bids on one or more lots and after the round, the final round for all the lots available in the secondary stage has occurred.

If the final round for a lot is also the last round of the secondary stage and the pseudorandom process must be conducted to determine the final high bid for the lot, then the rounds of the secondary stage end immediately after that process has been conducted.

After the rounds of the secondary stage end, the auction manager must inform each bidder through the auction system that the secondary stage has ended and the auction will progress to the assignment stage.

Section 130 Allocation of lots to secondary winners

This section provides that the secondary winner for a lot is allocated that lot.

Section 131 Determination of secondary prices

This section provides that the secondary price to be paid by the secondary winner for all residual lots allocated to the secondary winner is the sum of the residual prices of all the residual lots allocated to that winner.

The secondary price is a component of the spectrum access charge imposed in relation to the spectrum licences to be issued to winning bidders. As such, this section relates to Division 7 of Part 5 of the determination, which fixes the spectrum access charges for issuing spectrum licences, for the purpose of section 294 of the Act. This provision is therefore disallowable under section 42 of the LA.

The residual price for an allocated lot of a product in the secondary stage is an amount equal to:

- if there is only valid one bid on the lot – the starting price for the lot; or
- if there is more than one valid bid on the lot – the highest bid made for the lot by any bidder, during any round of the secondary stage, other than the final high bid.

Section 132 Results of the secondary stage

After the secondary winners and secondary prices are determined, the auction manager must tell each secondary winner, in writing, the lots of each product allocated to the secondary winner and the residual price for the allocated lot of each product and the secondary price to be paid by the secondary winner for all allocated lots.

After the secondary winners and secondary prices are determined, the auction manager must tell all bidders, in writing, the total number of secondary winners and which residual lots were allocated.

Section 133 End of the secondary stage

The auction manager must tell each primary winner and each secondary winner the sum of the primary price and the secondary price, for all the allocated lots in the primary stage or secondary stage, of each product of that winner.

The auction manager must tell each bidder that the secondary stage is completed immediately after providing the results of the secondary stage in accordance with section 132.

Division 3—Rules for the assignment stage

Subdivision A—Application

Section 134 Application of Division

This section sets out the purpose of the assignment stage and the lots to which it applies.

For each auction, Division 3 of Part 6 applies to each lot allocated to a bidder in the primary stage of the auction, each lot allocated to a bidder in the secondary of the auction, and for the 3.4 GHz auction, each leftover lot (if any) not directly allocated to a person under Division 1 of Part 5 of the determination.

The purpose of the assignment stage is to assign frequency ranges to lots allocated to a person in the primary and secondary stages of an auction, and for the 3.4 GHz auction, to allocate any leftover lots (with their frequencies) not directly allocated to a person.

Subdivision B—Arrangements for assignment stage

Section 135 Determination of frequency range options

This section sets out the frequency range options available and specifies who is entitled to bid in the assignment stage.

For each product where at least one lot was allocated to a bidder in the primary or secondary stage, the auction manager must determine the list of frequency range options available to the bidder. The frequency range options must include every possible contiguous frequency range option.

Each frequency range option for a bidder must be a contiguous frequency range corresponding in bandwidth to the total lot bandwidth of the lots of the product allocated to the bidder in the primary stage and the secondary stage of the auction.

If a bidder is participating in a given assignment round for more than one product, the auction manager may determine frequency range options available to the bidder that deal with the products as a group. Offering frequency range options to a group of products is intended to enable bidders to obtain common frequency ranges across different geographic areas. This may facilitate the efficient use of spectrum by licensees.

If one or more leftover lots were not directly allocated, then in the 3.4 GHz auction, each frequency range option for the product that is the adjacent product (according to the marketing plan) to a leftover lot must:

- include the frequency of the leftover lot; and
- correspond in bandwidth to the sum of:
 - the total lot bandwidth of the products lots allocated to the bidder in the primary stage and secondary stage; and
 - 2.5 MHz (the lot bandwidth for leftover lots).

Section 136 Auction manager must make frequency range options available

At least 24 hours before the start of the first assignment round, the auction manager must provide each bidder in the assignment stage with the list of frequency range options available to the bidder in each of the assignment rounds. The options will relate to the lots of a product that were allocated to the bidder in the primary stage or secondary stage.

Section 137 Scheduling of products and rounds

This section sets out the requirements the auction manager must meet in scheduling the rounds of the assignment stage. After the completion of the primary stage and secondary stage (if any), the auction manager must announce the anticipated start time and end time of each assignment round, and the product or products that will be the subject of each assignment round.

The auction manager must allow at least 48 hours between the end of the secondary stage (or the end of the primary stage, if there is no secondary stage) and the start of the first assignment round. Assignment rounds must start and end between 9.00 am and 5.00 pm on working days, other than recess days. All other scheduling is at the auction manager's discretion, including modifying the

schedule of rounds. The auction manager must set the order in which the products are the subject of assignment rounds. A product must not be the subject of more than one assignment round, but two or more products may be the subject of one assignment round.

Subdivision C–Bidding in the assignment stage

Section 138 Availability of a product for bidding in rounds of the assignment stage

In a round of the assignment stage, the only products available for bidding are the product or products that the auction manager has announced will be the subject of the assignment round.

Section 139 Making bids

This section describes who may bid in an assignment round, what an assignment bid consists of, how a bidder may bid, how a bid can be changed during an assignment round and which bids are considered binding.

A bidder is entitled to bid in an assignment round if the bidder was allocated at least one lot of a product in the primary or secondary stage, and that lot is the subject of the assignment round.

A bid in the assignment stage consists of the frequency range option that is being bid for and a bid price for the option that is a multiple of \$100.

The bidder can make one bid for each option in the list of frequency range options determined for a bidder. The bid will have been made in a round when the bid has passed data validation checks performed by the auction system.

A bidder can change, delete or replace a bid in the auction system during an assignment round as often as desired, subject to data validation checks. The bid that will be treated as binding for a bidder is the bid in the auction system at the end time of the assignment round.

Section 140 Validity of assignment bids

This section sets out the conditions for valid bids during the assignment rounds that will be considered in determining winning assignment bids.

To be valid, a bid in the assignment stage must be:

- received between the start time and end time of the round (except where permitted by the auction manager to be made after an assignment round has ended); and
- for a frequency range option for lots of a product that were allocated to the bidder in the primary or secondary stage of the auction; and
- for a frequency range option in the list of frequency range options determined for the bidder; and
- a multiple of \$100.

A valid bid in the assignment stage is an **assignment bid**.

Section 141 Deemed zero dollar bids

If a bidder does not make an assignment bid for a frequency range option, the bidder is treated as having made an assignment bid for the option with a bid price of zero dollars.

Section 142 Assignment rounds in which bidding is not required

This section applies if there is only one frequency range option available to each assignment bidder.

If this section applies:

- bidders do not make bids for the product in the assignment round using the auction system; and
- each affected bidder is instead treated as having made an assignment bid with a bid price of zero dollars for the only frequency range option available; and
- the auction manager must inform each affected bidder that this is the case at least 24 hours before the start of the first assignment round.

Subdivision D—Bringing the assignment stage to an end

Section 143 Determination of winning assignment bids for an assignment round

This section sets out the rules for determining the winning assignment bids in the assignment stage.

After an assignment round has ended, the auction manager must tell each assignment bidder in the round the frequency range option in its winning assignment bid.

To be a *winning assignment bid*, the bid must meet the following requirements:

- only one bid is selected from each assignment bidder for the assignment round;
- the frequency ranges included in any pair of winning assignment bids for a product or a group of products do not overlap;
- the sum of the bid prices in the assignment bids is maximised;
- if any lots of a product were not allocated in the primary stage or secondary stage (if any), the unassigned frequency range that will result from those unallocated lots is a contiguous frequency range.

The assignment bids selected must maximise the sum of the assignment bid prices. The auction system will use a computerised pseudorandom selection process to determine winning assignment bids if more than one combination of bids meet the above requirements.

The *assignment winner* for a frequency range for a product for an assignment round is the assignment bidder whose winning assignment bid was for that frequency range.

A winning assignment bid will have an assignment price, and therefore the spectrum access charge imposed in relation to the spectrum licence to be issued to winning bidders is disallowable under section 42 of the LA as this section relates to Division 7 of Part 5 of the determination for the purposes of section 294 of the Act.

Section 144 Determination of assignment price for an assignment round

This section explains how the assignment price of each winning assignment bid is calculated in each assignment round.

After the end of an assignment round, the auction manager must tell each assignment winner in the round the assignment price for its winning assignment bid. The assignment price is a component of the spectrum access charge imposed in relation to the spectrum licences to be issued to assignment bidders. As such, this section relates to Division 7 of Part 5 of the determination, which fixes the

spectrum access charges for issuing spectrum licences, for the purpose of section 294 of the Act. This section is therefore disallowable under section 42 of the LA.

The assignment price for a winning assignment bid is the price determined by the auction manager in accordance with this section. The assignment price for a winning assignment bid:

- must not exceed the bid price for the bid; and
- may be zero; and
- must be zero if there is only one assignment bidder in the assignment round.

Subject to those requirements, a set of assignment prices in the assignment round must be selected so that:

- there is no alternative assignment bidder, or group of assignment bidders, who based on their bids that could feasibly form part of a combination of winning assignment bids, would pay more than any assignment winner or group of winners; and
- the sum of the assignment prices is also minimised if more than one set of assignment prices satisfies the above requirement; and
- if two or more sets of assignment prices satisfy the above two requirements, it is the set that is the solution to the weighted Nearest–Vickrey–Core pricing rule formula.

Under the weighted Nearest–Vickrey–Core pricing rule, the assignment winner pays a price less than or equal to its bid price. There are a number of steps to determine this price. First, the Vickrey price for each assignment winner is calculated. The Vickrey price is calculated by taking the assignment winner’s bid price, and subtracting the difference between the highest value combination of assignment bids and the highest value package combination of assignment bids that can be formed without the assignment winner. The Vickrey prices are valid assignment prices if no other assignment winner or group of assignment winners is willing to pay more for a frequency assignment than the Vickrey price for one assignment winner or the sum of Vickrey prices for a group of assignment winners specific to that frequency assignment. Otherwise, the price must be raised from the Vickrey prices to satisfy that condition. When this price adjustment is required for a number of assignment winners, the price increase is shared between assignment winners proportional to the starting prices of their allocated lots.

As a result, the weighted Nearest–Vickrey–Core pricing rule chooses a minimum price for each bidder such that:

- every bidder is satisfied, in the sense that no bidder or group of bidders is willing to pay more for an alternative frequency range option than what the price of that option is to its particular assignment winners; and
- prices are adjusted proportionally—bidders who win more lots have their prices increased more to satisfy the above requirement; and
- the bid price is respected—the price of a bid serves as a ceiling on proportional adjustment in the above requirement. The remainder falls proportionally on other bidders.

Assignment prices will be rounded to the nearest \$100.

Section 145 3.4 GHz auction—allocation of leftover lots to assignment winners

This section applies to the 3.4 GHz auction, if one or more leftover lots were not directly allocated. The assignment winner of a frequency range option that includes the frequency range of a leftover lot is allocated the leftover lot.

Section 146 Assignment of frequency

This section provides that the lots allocated to a bidder in the primary or secondary stage are assigned the frequency range specified in the bidder's winning assignment bid for that product (not including any part of that frequency range that is the frequency range of a leftover lot).

Section 147 Determination of total assignment price

This section provides that the total assignment price to be paid by an assignment winner for the assignment of a frequency range or frequency ranges to lots of a product or group of products in the assignment stage is the sum of the assignment prices for all the assignment winner's winning assignment bids.

This section relates to Division 7 of Part 5 of the determination for the purposes of section 294 of the Act, and is disallowable under section 42 of the LA.

Section 148 Results of the assignment stage

After the end of all assignment rounds, the auction manager must tell each assignment winner:

- the frequency ranges assigned to the lots of each product that were allocated to the assignment winner in the primary or secondary stage (if any); and
- any assignment price for the assigned frequency ranges; and
- for the 3.4 GHz auction—the leftover lot or lots allocated to the assignment winner in the assignment stage of the 3.4 GHz auction.

Section 149 End of the assignment stage

The assignment stage is complete when all assignment rounds have been conducted, the auction manager has notified all assignment winners of the results of every assignment round, and the auction manager has notified each assignment winner of any allocated leftover lots for the 3.4 GHz auction.

Part 7—Miscellaneous

Section 150 Unallocated spectrum

This section provides that the ACMA may allocate any spectrum remaining unallocated using a procedure to be determined by the ACMA. The ACMA may make determinations under section 60 of the Act about allocations by auctions or by other procedures.

Section 151 Applicants and bidders must not misuse auction system

This section provides that an applicant or bidder must only access and use the auction system in accordance with the information about access and use provided under the determination. An applicant or bidder must not attempt to interfere with, disrupt or damage the auction system, or use it to breach a law of the Commonwealth.

Section 152 The ACMA may obtain information from applicants and bidders

The ACMA may wish to obtain information or documents from an applicant or bidder for a number of reasons, including for the purposes of determining whether any contravention of the determination has occurred, or considering whether applicants or bidders 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 exercise of its powers under the determination, the ACMA can require the applicant or bidder to:

- give it any such information in a specified manner and within a specified time; or
- produce any such documents to the ACMA within a specified time and in a manner and form specified by the ACMA.

Section 153 Use of information and documents by the ACMA

This section provides that the ACMA may use information or documents it obtains in the performance of its functions or exercise of its powers under the determination:

- for the purposes of the determination, including disclosing or publishing information or documents as provided for in the determination; or
- in relation to spectrum licences to be issued as a result of the allocation process.

The ACMA may retain possession of a document or other item given to the ACMA for purposes of the determination for as long as it is necessary for the performance of the ACMA's functions and exercise of its powers under the determination or the Act. The ACMA may also disclose information or documents in accordance with Part 7A of the ACMA Act or as otherwise authorised by law.

Section 154 The ACMA to provide information to ACCC on request

This section requires the ACMA to provide specified information to the ACCC, where the ACCC has requested the information in relation to the allocation process or any applicant or bidder. Information that may be requested includes forms and deeds submitted by an applicant prior to and 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 an auction and information about the outcome of the allocation process.

Section 155 Retention of eligibility payment or enforcement of deed of financial security for breach of auction procedures

This section sets out the actions 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 an eligibility payment made, or enforce a deed of financial security given, by an applicant or bidder in any of the following circumstances:

- the ACMA is satisfied that the applicant or bidder, or related person, or contractor has breached a provision of the determination, and the breach affected or may have affected the outcome of the allocation process; or
- the ACMA is satisfied that the applicant or bidder, or a related person of the applicant or bidder, or a contractor of the applicant or bidder, breached the confidentiality obligation; or
- the ACMA is satisfied that the bidder was affiliated with another bidder during the allocation period; or
- the bidder failed to give a statement required under section 70; or
- the bidder is a winning bidder who failed to pay the balance of the total winning price; or
- the applicant or bidder failed to comply with a requirement in a notice given under subsection 152(1).

The ACMA must notify the applicant or bidder of a decision under this section, and the nature of the breach of failure, before the later of:

- six months after the end of the allocation period; or
- six months after the day on which the breach or failure occurred or first occurred.

An eligibility payment retained under this section, or an amount obtained through enforcement of a deed of financial security, is forfeited to the Commonwealth unless the Federal Court orders the return of the amount.

Section 156 Effect of retention on winning bidders

This section provides that, if the ACMA makes a decision to retain an eligibility payment or enforce a deed of financial security in relation to a winning bidder, then the ACMA must not issue a spectrum licence to the bidder and the parts of the spectrum assigned to the lots allocated to the bidder under the determination will be taken to be unallocated.

Section 157 Application to Federal Court for return of retained amount

This section provides that, where an applicant or bidder has been notified by the ACMA of its decision to retain an eligibility payment or enforce a deed of financial security, the applicant or bidder may, within one year of receiving the notice, apply to the Federal Court for return of all or part of an eligibility payment or an amount obtained through the enforcement of a deed of financial security.

On application, the Court may:

- if the Court is not satisfied that the breach identified in the notice was committed—order the return of all of the amount; or
- if the Court is satisfied that the breach identified in the notice was committed, but considers that it would be disproportionate for the Commonwealth to keep the relevant amount—order the return of part of the amount.

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

Section 158 No liability of the ACMA, etc

This section excludes the ACMA's, the auction manager's and the Commonwealth's liability in respect of damages or costs arising from any act or omissions of any person in relation to the allocation procedures set out in the determination.

The allocation of parts of the spectrum is likely to result in multiple sales of valuable assets at high prices. This section is intended to protect the public interest in relation to claims for damages or costs which may be brought in respect of the conduct of the allocation process. This section would not prevent a person from taking proceedings (including judicial review proceedings) or exclude the jurisdiction of any court. The section names both the ACMA and the Commonwealth, as although the ACMA does not have a separate legal identity to the Commonwealth, proceedings may still be brought in the name of the ACMA.

The section also names the auction manager, as the auction manager is typically a member of ACMA staff, and it would not be reasonable for the auction manager to be liable for damages or costs against their personal assets as a result of their good faith conduct of their duties as auction manager.

Section 159 Other rights not affected

This section makes it clear that the determination does not limit any other right of action or remedy which the ACMA or the Commonwealth has against a person.

Section 160 Auction manager may delegate functions and powers

The auction manager may delegate any of the auction manager's functions and powers under the determination to:

- a member, within the meaning of the ACMA Act; or
- a member of the ACMA staff that holds, or is acting in, an Executive Level 1 or 2 position, or an equivalent position; or is an SES employee or acting SES employee.