

EXPOSURE DRAFT

Explanatory Statement

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021

Issued by the authority of the Minister for Communications, Urban Infrastructure,
Cities and the Arts

Purpose

The purpose of the Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021 (the Direction) is to require the Australian Communications and Media Authority (ACMA) to impose limits on the aggregate of the parts of the spectrum that may be used by persons, or groups of persons specified in the Direction, as a result of the reallocation of spectrum in the 850/900 MHz band.

The Direction has the effect of requiring the ACMA, in determining procedures to be applied for allocating spectrum in the 850/900 MHz band, to ensure that no person or relevant group of persons may use, as a result of the allocation of spectrum licences, more than an aggregate of 82 MHz (the 82 MHz limit) of spectrum below 1 GHz (the sub-1 GHz band) under spectrum licences in the relevant area. The planning arrangements for spectrum reallocated in the 850/900 MHz band will be optimised for use in 4G and 5G mobile networks.

Spectrum-licensed bands in the sub-1 GHz band, of which the 850/900 MHz band is part, is closely substitutable for the 850/900 MHz band. This spectrum is well suited to providing wide-area and in-building coverage due to its unique propagation characteristics, and is therefore highly sought after by mobile network operators (MNOs). Disparity in sub-1 GHz spectrum-licensed holdings between MNOs currently exists. If this disparity is not addressed, or asymmetry in sub-1 GHz band holdings further increases it could constrain the ability of some MNOs to compete effectively in the downstream consumer mobile market.

The intent of the 82 MHz limit is to prevent monopolisation of spectrum licences in the sub-1 GHz band, partially addressing the disparity in sub-1 GHz band spectrum licence holdings between MNOs, whilst enabling competition between MNOs, and any other bidders. This limit will enable the three national MNOs—Optus, Telstra and TPG Telecom—to acquire further spectrum below sub-1 GHz, but will prevent any one MNO from using more than 40% of spectrum-licensed spectrum in the sub-1 GHz band. The limit will support the government's communications policy objectives of promoting competitive market outcomes for the long term benefit of consumers, supporting the deployment of 4G and 5G technologies and supporting continuity of services.

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The 82 MHz limit aligns with advice provided to the Minister for Communications, Urban Infrastructure, Cities and the Arts (the Minister) by the Australian Competition and Consumer Commission (the ACCC), which recommended limits apply such that no person, or relevant group of persons, could use more than 80 MHz of spectrum in the sub-1 GHz band. 2 MHz has been added to the recommended limit to account for the fact that 2 MHz of 'downshift' spectrum will be allocated to the winner of the lowest lot in the 900 MHz band. The downshift spectrum will facilitate a 1 MHz downshift of spectrum holdings in the adjacent 850 MHz band to align with internationally harmonised frequency ranges. It will also enable full utility of the lowest 900 MHz lot by removing the need for a 1 MHz guard band. An 82 MHz limit will not enable bidders to acquire any more lots at the 850/900 MHz auction than an 80 MHz limit would have.

The Direction also has the effect of requiring ACMA to set-aside 10 MHz of spectrum each in the upper four lots of the 900 MHz band (from 895 to 915 MHz and 940 to 960 MHz) for Optus and TPG Telecom and their relevant associates, if they elect to take up the spectrum set-aside. The Direction does this by imposing limits on the amount of spectrum that other participants to the auction can acquire if either, or both of, Optus and TPG Telecom elect to take up the spectrum set-aside.

The upper four lots of the 900 MHz band have been identified for set-asides as these lots provide the opportunity for Optus and TPG Telecom to acquire spectrum currently used by these MNOs under apparatus licences which will be cleared as a result of the *Radiocommunications (Spectrum Re-allocation—850/900 MHz Band) Declaration 2020*. This is in contrast to the lowest lot in the 900 MHz band which does not cover spectrum currently used by Optus or TPG Telecom. This lot is adjacent to the 850 MHz band and therefore has different spectrum utility due to a 1 MHz guard band with the 850 MHz band. Additionally, the winner of this lot will also be allocated 2 MHz of 'downshift' spectrum in the 850 MHz band.

Supporting continuity of services is one of the Government's communications policy objectives underpinning the reallocation of spectrum in the 850/900 MHz band. Optus and TPG Telecom rely heavily on their 900 MHz spectrum holdings to provide their services. Guaranteeing Optus and TPG Telecom access to spectrum in the 900 MHz band will provide these operators, the ability to continue providing existing services to their customers. Without access to the 900 MHz band, these carriers may be unable to provide some of their existing services due to a lack of access to suitable replacement spectrum. Any reduction in service is likely to have a greater impact on regional areas than metropolitan areas, as the propagation qualities of sub-1 GHz spectrum makes it particularly useful for providing wide area coverage economically in these areas.

Other options to support service continuity, for example, relying on the overall 82 MHz limit or setting a specific limit for the 900 MHz band, present greater risks to achieving this objective as they do not guarantee that each of Optus and TPG can acquire 10 MHz of spectrum in the 900 MHz band, the minimum amount necessary to continue the provision

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of existing services. The ACCC noted in its advice that the absence of set-asides would likely lead to a more efficient allocation of spectrum. However, the proposed set-asides retain scope for market mechanisms to determine the most efficient allocation of lot frequencies while reducing the risk to consumers that services are disrupted as a result of the reallocation of spectrum.

The ACCC advised the Minister that there were no grounds to set-aside spectrum for Telstra in order to support continuity of services. Telstra has the greatest existing spectrum holdings in the sub-1 GHz band of the three national MNOs. These greater existing holdings mean that Telstra does not rely on use of the 900 MHz band to operate in the national mobile services market. In contrast to Optus and TPG Telecom, Telstra has limited deployments in the 900 MHz band. For these reasons the reallocation of the 900 MHz band is unlikely to have a substantial impact on Telstra's ability to continue providing its existing services. Consequently, the Minister has not directed ACMA to set-aside spectrum for Telstra at the auction.

Authority

The Direction is made by the Minister under subsection 60(10) of the *Radiocommunications Act 1992* (the Act).

Under section 60 of the Act, the ACMA is required to determine procedures to be applied in allocating spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act. Section 153L requires spectrum licences to be issued under this Subdivision where the Minister has made a spectrum re-allocation declaration under section 153B of the Act making specified parts of the spectrum subject to re-allocation through the issue of spectrum licences. A spectrum re-allocation declaration initiates the process for re-allocating spectrum in the frequency bands named in the declaration.

Subsection 60(5) of the Act empowers the ACMA to determine procedures under subsection 60(1) that impose limits on the aggregate of the parts of the spectrum that may be used by any one person or specified person, or members of a specified group of persons, as a result of the allocation of spectrum licences under Subdivision B of Part 3.2 of the Act. However, subsection 60(9) of the Act provides that this power to determine limits may only be exercised by the ACMA if it is directed to do so by the Minister under subsection 60(10) of the Act.

Subsection 60(10) of the Act allows the Minister to give written directions to ACMA in relation to the exercise of its power to determine procedures imposing a limit mentioned in subsection 60(5) of the Act.

Subsection 60(6) of the Act sets out the manner in which limits imposed under subsection 60(5) of the Act may be expressed to apply, including by reference to a specified part of the spectrum, specified area or specified population reach.

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

Background

The Minister made the *Radiocommunications (Spectrum Re-allocation—850/900 MHz Band) Declaration 2020* (the Declaration) in October 2020. The Declaration specified that parts of the spectrum in the 850/900 MHz band would be subject to reallocation by issuing spectrum licences. ACMA is planning to allocate this spectrum via auction.

Concurrent with making the Declaration, the Minister sought advice from the ACCC on appropriate allocation limits (also known as competition limits) for the 850/900 MHz auction. The ACCC undertook public consultation to assist with the preparation of its advice in November and December 2020. The ACCC provided its final advice to the Minister in March 2021.

Spectrum in the 850/900 MHz band has been identified internationally, and by the ACMA, for the delivery of wireless broadband services, including for 4G and 5G mobile networks. 900 MHz band spectrum is currently used by Optus, Telstra and TPG Telecom under apparatus licensing arrangements.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) confirmed that a Regulatory Impact Statement is not required for the Direction on the grounds that the direction was assessed as having a no more than minor impact on the implementation of the reallocation process (OBPR ID 43548).

Consultation

The Minister sought advice in October 2020 from the ACCC on appropriate allocation limits for the auction (if any), and whether there were grounds to set-aside spectrum for Telstra. The ACCC consulted publicly on competition issues associated with the auction in December 2020. Six submissions were received to this consultation, from Connected Farms, NBN Co, Optus, Pivotel, Telstra and TPG Telecom. The ACCC provided its advice to the Minister in March 2021.

Consultation was also undertaken with the ACMA, the ACCC and industry stakeholders in relation to the terms of the Direction.

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Attachment 1: Notes on Sections

Section 1—Name

Section 1 provides that the instrument is the *Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021* (the Direction).

Section 2—Commencement

Section 2 provides that the Direction will commence on the day after it is registered on the Federal Register of Legislation, which may be accessed online at www.legislation.gov.au.

Section 3—Authority

Section 3 identifies subsection 60(10) of the *Radiocommunications Act 1992* as the power that authorises the making of the Direction.

Section 4—Interpretation

Section 4 defines expressions used in the Direction.

The note to the section states that a number of expressions used in the instrument are defined in the Act, including ‘spectrum’ and ‘spectrum licence’.

800 MHz band is defined to mean the parts of the spectrum from 825 MHz to 845 MHz and 870 MHz to 890 MHz.

850/900 MHz band is defined to mean the parts of the spectrum that are subject to re-allocation under the re-allocation declaration.

Act is defined to mean the *Radiocommunications Act 1992*.

associate is defined to mean:

- (a) in relation to a person that is a body corporate:
 - (i) a director or secretary of the body; or
 - (ii) a related body corporate; or
 - (iii) a director or secretary of a related body corporate; or
 - (iv) an individual who controls at least 15% of the voting power or holds at least 15% of the issued shares in the body; or
- (b) in relation to a person that is an individual:
 - (i) the individual’s spouse; or
 - (ii) the individual’s de facto partner within the meaning of the *Acts Interpretation Act 1901*; or
 - (iii) 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
 - (iv) a body corporate of which the individual is a director or secretary; or

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- (v) a body corporate that is a related body corporate in relation to a body corporate of which the individual is a director or secretary; or
- (c) in relation to any person (the ‘first person’)—any other person (other than the Commonwealth when represented by the ACMA) who is party to a relevant agreement with the first person that either or both:
 - (i) is for the use by one party to the agreement of spectrum licensed to another party to the agreement under a spectrum licence for a part of the spectrum referred to in the re-allocation declaration;
 - (ii) relates to the acquisition of a spectrum licence for a part of the spectrum referred to in the re-allocation declaration.

The term ‘associate’ is used in the definition of ‘relevant group of persons’ and ‘relevant associate’.

In the definition of ‘relevant group of persons’, the primary purpose of the definition is to ensure that a person cannot seek to circumvent the effect of allocation limits by having another person or body they have a close connection to, a high degree of control or influence over, or a commercial agreement dealing with spectrum licensing with, apply for a spectrum licence on their behalf in order to circumvent the allocation limits.

In the definition of ‘relevant associate’, which is used in the set aside limits for Optus and TPG, the term is construed more narrowly. A ‘relevant associate’ means a person who is an associate of a body corporate because they are a related body corporate, or because they are party to a commercial agreement dealing with spectrum licensing.

carrier is defined to have the same meaning as in the *Telecommunications Act 1997*.

designated area is defined to mean the named area listed in item 1 of the table in subsection 5(4) of the re-allocation declaration.

marketing plan is defined to mean the marketing plan made by ACMA for section 39A of the Act in relation to the 850/900 MHz band, as in force on its commencement. The marketing plan will be published on ACMA’s website, www.acma.gov.au, when finalised.

metropolitan area is defined to mean the area that is identified by ACMA as the metropolitan area in the marketing plan, the boundaries of which are identified in the marketing plan. The note explains that the term **metropolitan area** will be a single area identified by ACMA in the marketing plan and will include geographic areas generally corresponding to the metropolitan areas of Adelaide, Brisbane, Canberra/Sydney, Melbourne and Perth.

Optus is defined to mean Optus Mobile Pty Limited (ACN 054 365 696).

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public mobile telecommunications service is defined to have the same meaning as in the *Telecommunications Act 1997*. This term is used in the definitions of relevant agreement and roaming services agreement.

re-allocation declaration is defined to mean the *Radiocommunications (Spectrum Re-allocation—850/900 MHz Band) Declaration 2020*.

regional area is defined to mean the area that is not, and does not overlap with, the metropolitan area, is identified as the regional area in the marketing plan and the boundaries of which are defined in the marketing plan.

related body corporate is defined to have the same meaning as in the *Corporations Act 2001*.

relevant agreement is defined to mean an agreement, arrangement or understanding, whether formal or informal (or a combination of the two), written or oral (or a combination of the two), and whether or not having legal or equitable force or based on legal or equitable rights. However, the definition excludes roaming services agreements or an agreement between carriers provided for by or under the *Telecommunications Act 1997* or Part XIC of the *Competition and Consumer Act 2010*. The term relevant agreement is used in the definition of associate.

relevant associate is defined to mean, in relation to a person that is a body corporate (the **first person**), a person who is an associate of the first person because of subparagraph (a)(ii) or paragraph (c) of the definition of **associate**.

relevant bands is defined to mean the parts of the spectrum in the designated area from 895 to 915 MHz and 940 to 960 MHz. The term 'relevant bands' is used in section 6 of the Direction.

relevant group of persons is defined to mean either a person and all associates of that person; or – subject to subsection 4(3) – any 2 or more groups referred to in paragraph (a) that have at least one member in common.

roaming services agreement is defined to mean an agreement between two or more carriers for the principal purpose of enabling the supply of public mobile telecommunications services by one of those other carriers, in geographic locations where another of those carriers' public mobile telecommunications services are not available. Roaming services agreements are carved-out from the definition of relevant agreement, as described above.

sub-1 GHz band is defined to mean the part of the spectrum up to 1 GHz.

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TPG Telecom is defined to mean TPG Telecom Limited (ACN 096 304 620).

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

Subsection 4(3) provides a limited exclusion from the definition of ‘relevant group of persons’ by providing that for the purposes of paragraph (b) of that definition, 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:

- (a) 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 of the groups;
- (b) the individual is providing the company secretarial services through a person or entity (‘third party service provider’) that:
 - (i) is not in any of the groups; and
 - (ii) carries on a business for the provision of professional services, including company secretarial services; and
 - (iii) has, in the ordinary course of carrying on that business, been separately and independently engaged by an entity within each of those groups, under a contract or other legally binding arrangement, to provide the company secretarial services;
- (c) the individual is not, otherwise than by reason of providing the company secretarial services, an associate of any of the relevant persons;
- (d) each of the related bodies corporate to which the individual is providing the company secretarial services is incorporated outside Australia.

The criteria specified are intended to ensure that, for the purposes of paragraph (b) of the definition of ‘relevant group of persons’, individuals are taken not to be members in common between groups of persons referred to in paragraph (a) of that definition in certain circumstances where they are genuinely at arms-length from the related bodies corporate.

In particular, this is intended to address the fact that some related bodies corporate (i.e. associates) of persons who are likely to be interested in acquiring spectrum licences through the allocation process (referred to as ‘relevant persons’ in subsection (3)) may have company secretaries who have been supplied by independent third parties (e.g. law firms or other professional services firms). This is not an uncommon practice in certain offshore jurisdictions. For example, a related body corporate that operates in a different jurisdiction to its parent company may engage a local firm with particular expertise in that jurisdiction

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to supply an individual (e.g. an employee, contractor or partner) to act as a company secretary. Alternatively, the parent company may engage such a firm to provide company secretary services on behalf of one or more its foreign related bodies corporate. In some instances, the same third party may be engaged by, and may supply the same individual to, entities within two different groups of relevant persons and their associates.

Without this exemption, those two groups of relevant persons and their associates would be taken to be a single specified group of persons for the purposes of the allocation limits. This could unduly restrict the ability of those persons to access spectrum due to a remote connection to another person seeking to be allocated spectrum, and go beyond the primary purpose of the allocation limits.

However, the exclusion is not intended to apply where the third party service provider is itself in one of the groups of relevant persons and their associates, or where the parties may have worked together to set up a 'third party service provider', or arranged to engage the same service provider to provide the same individual to act as company secretary, specifically to allow them to rely on the exclusion. Accordingly, paragraph (b) requires that the third party service provider: not be in any of the groups (subparagraph (i)); already be in the established business of providing company secretarial services (subparagraph (ii)); and, have been engaged by an entity in one group of relevant persons and their associates separately and independently of the entities in the other group(s) (subparagraph (iii)). Further, paragraph (c) is intended to clarify that the exclusion does not apply if the individual put forward to act as the company secretary by the third party service provider is otherwise an 'associate' of the relevant person (e.g. if they are also director of the relevant person who is a body corporate, one of its related bodies corporate).

Section 5—Direction

Subsection 5(1) of the Direction directs ACMA to determine allocation procedures under subsection 60(1) of the Act that impose limits, in accordance with sections 6 and 7, on the aggregate of the parts of the spectrum that may, as a result of the allocation of spectrum licences under Subdivision B of Division 1 of Part 3.2 of the Act, be used by any one person or by the groups of persons specified in those sections.

Subsection 5(2) provides that limits imposed must apply to the allocation of spectrum licences in the 850/900 MHz band enabled by the re-allocation declaration.

Section 6—Limits applying to groups of persons other than Optus, TPG Telecom and their relevant associates (spectrum set-aside for Optus and TPG Telecom)

Section 6 imposes limits on the aggregate of the amount of spectrum in the relevant bands a person, or group of persons, may use in the specified circumstances.

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Paragraph 6(1)(a) provides that for this section the limits imposed must apply in relation to the relevant bands in the designated area.

Paragraph 6(1)(b) provides that the limits imposed must be in accordance with the operation of the table in the section. The limits imposed must ensure that, with respect to each item in the table, in the circumstance specified in column 2 of the table, the members of the group of persons specified in column 3 may, in total, use no more than an aggregate of the amount of spectrum in the relevant bands that is specified in column 4.

Item 1 of the table will apply if both Optus and TPG Telecom have elected to take up the spectrum set aside. Item 2 will apply if Optus has elected to take up the spectrum set-aside, but TPG Telecom has not. Item 3 will apply if TPG Telecom has elected to take up the spectrum set-aside, but Optus has not.

Item 1 provides that if Optus and TPG Telecom have elected to take up the spectrum set aside:

- (a) every person other than Optus and TPG Telecom and their relevant associates, may in total use no more than an aggregate of 20 MHz of spectrum in the relevant bands;
- (b) every person other than Optus and its relevant associates, may in total use no more than an aggregate of 30 MHz of spectrum in the relevant bands; and,
- (c) every person other than TPG Telecom and its relevant associates, may in total use no more than an aggregate of 30 MHz of spectrum in the relevant bands.

Item 2 provides that if Optus has elected to take up the spectrum set-aside, but TPG Telecom has not, every person other than Optus and its relevant associates may in total use no more than an aggregate of 30 MHz of spectrum.

Item 3 provides that if TPG Telecom has elected to take up the spectrum set-aside, but Optus has not, every person other than TPG Telecom and its relevant associates may in total use no more than an aggregate of 30 MHz of spectrum.

For example, in the event that Optus and TPG Telecom have elected to take up the set-aside spectrum, and there is one other bidder, 'A':

1. 'A' may, in total, use up to 20 MHz of spectrum in the relevant bands (per Item 1 (a))
2. TPG Telecom and its relevant associates, and 'A', may, in total, use up to 30 MHz of spectrum in the relevant bands (per Item (b)); and
3. Optus and its relevant associates, and 'A', may, in total, use up to 30 MHz of spectrum in the relevant bands (per Item 1 (c)).

40 MHz of spectrum will be allocated in the relevant bands. 'A' cannot use more than 20 MHz of spectrum in the relevant bands (per 1, above). Any combination of Optus or TPG Telecom and 'A' could not use more than an aggregate of 30 MHz of spectrum. This can be represented in the below equation:

$$A \leq 20 \text{ MHz}$$

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$$A + \textit{Optus} \leq 30 \textit{ MHz}$$
$$A + \textit{TPG Telecom} \leq 30 \textit{ MHz}$$

Assuming 'A' uses the maximum allowed aggregate of 20 MHz of spectrum in the relevant bands:

$$20 \textit{ MHz} + \textit{Optus} \leq 30 \textit{ MHz}$$
$$20 \textit{ MHz} + \textit{TPG Telecom} \leq 30 \textit{ MHz}$$
$$\textit{Optus} \leq 10 \textit{ MHz}$$
$$\textit{TPG Telecom} \leq 10 \textit{ MHz}$$

Therefore, Optus and TPG Telecom would be guaranteed the opportunity to use at least 10 MHz (i.e. one lot of 2 x 5 MHz) of spectrum in the relevant bands, if they have each elected to take up the spectrum set-aside.

If, for example, Optus does not elect to take up the spectrum set-aside, but TPG Telecom does, and two other bidders 'A' and 'B' participate in the auction, the total aggregate spectrum in the relevant bands that could be acquired at the auction by A and B is 30 MHz (per item 3 of the table). The remaining 10 MHz of spectrum in the relevant bands would be set-aside for TPG Telecom.

In the event that neither Optus nor TPG Telecom elect to take up the spectrum set-aside, no limit would apply to the aggregate amount of spectrum a person could use in the relevant bands. However, the overall allocation limits set out in section 7 would still apply. The limits in section 7 would also apply if Optus, TPG Telecom or both, elect to take up the set-aside. If Optus or TPG Telecom elect to take up the set-aside, this spectrum would be counted towards the limit provided in section 7. Any set-aside lots that are not taken up will be made available for other bidders in the auction to purchase.

Optus and TPG Telecom currently make extensive use of their apparatus licensed holdings in the 900 MHz band to provide mobile services to their respective customers. Supporting continuity of services is one of the Government's communications policy objectives for the 850/900 MHz auction. Guaranteeing Optus and TPG Telecom access to spectrum in the relevant bands as set out in subsection 6(1) promotes this objective, as Optus and TPG Telecom would be able to continue providing services using 900 MHz spectrum with minimal interruptions (pending any necessary retuning following the auction).

Subsection 6(2) provides, for the purposes of subsection 6(1), that a person ***has elected to take up the spectrum set-aside*** in the allocation of spectrum licences in the 850/900 MHz band if all of the following apply:

- (a) either the person or a body corporate of which the person is a member (in either case, the ***participant***) has applied to be registered with the ACMA for the allocation in accordance with the allocation procedures;
- (b) if, under the allocation procedures, there is a period of time during which an application for registration may be withdrawn—that period has ended and the participant has not withdrawn their application;

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- (c) if the allocation procedures provide for circumstances in which an application for registration is taken to be withdrawn—those circumstances do not apply to the participant;
- (d) if, under the allocation procedures, in order to take up the spectrum set-aside, a person is required to do any of the following:
 - (i) pay to the ACMA an entry fee, a participation fee, or an application fee (however described);
 - (ii) give the ACMA notification in writing that the person elects to take up the set-aside;the participant has complied with any such requirements;
- (e) if:
 - (i) the allocation procedures provide for circumstances in which, having complied with any requirements of the kind referred to in paragraph (d), a person may withdraw their election to take up the spectrum set-aside; and
 - (ii) those circumstances have arisen;the participant has not withdrawn their election.

Paragraphs 6(2)(a) to (c) ensures that a participant will only be taken to have elected to take up the spectrum set aside if they have applied to be registered with the ACMA for the allocation in accordance with the allocation procedures, and have not withdrawn or be taken to have withdrawn their application for registration.

ACMA may determine in its allocation procedures requirements that must be met in order for a person to elect to take up the spectrum set-aside.

Paragraphs 6(2)(d) and (e) provide that, if, in accordance with these procedures a person pays a fee (however described), gives notification in writing that they elect to take up the set aside, and do not then withdraw their election, if permitted to do so under circumstances provided for under the allocation procedures, they will be taken to have elected to take up the spectrum set-aside.

This gives ACMA flexibility in how it chooses to deal with set-aside spectrum as part of the allocation procedures, and certainty as to whether a person has elected to take up the spectrum set-aside.

It is intended that in effect, if the usual spectrum auction procedures are prescribed for this auction, subsection 6(2) will require Optus and TPG Telecom to elect to take up the spectrum set-aside by the application deadline set in the allocation procedures. It would be necessary for any spectrum set-asides be taken up by this point as after the application deadline, and before the eligibility deadline of the allocation, applicants must indicate to the ACMA their provisional start demands for the auction. The start demands cannot be greater than the supply of lots at the auction, therefore ACMA, and potential auction participants, must know what spectrum is to be set-aside to determine how many lots will be available for bidders at the auction.

Section 7—Limit applying to all persons and relevant groups of persons

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Section 7 sets out limits applying to all persons and relevant groups of persons as to how much spectrum they may use in the sub-1 GHz band in each relevant area.

Paragraph 7(1)(a) sets out that for this section, the limits imposed must apply in relation to the sub-1 GHz band in the metropolitan area and the regional area. This is intended to make clear that the ACMA must impose limits on the aggregate of the parts of the spectrum that any person or specified group of persons may use in the sub-1 GHz band as a result of the allocation of spectrum licences in the 850/900 MHz band. Spectrum within the sub-1 GHz band, of which the 850/900 MHz band is part, is a close substitute for the 850/900 MHz band, particularly in relation to the deployment of mobile networks in Australia. Therefore, it is appropriate to take into account existing holdings in the sub-1 GHz band for the purposes of the allocation of the 850/900 MHz band.

Paragraph 7(1)(b) sets out that the limits imposed must ensure that no person or relevant group of persons may use no more than an aggregate of 82 MHz of the sub-1 GHz band under spectrum licences in the metropolitan area or the regional area. That is, a person, or relevant group of persons, may use up to 82 MHz of spectrum under spectrum licences in the metropolitan area and regional area, but cannot use more than 82 MHz of spectrum under spectrum licences in either area. The intent of the 82 MHz limit is to prevent monopolisation of spectrum-licensed spectrum in the sub-1 GHz band and partially address the disparity in sub-1 GHz band spectrum-licensed holdings between MNOs. This limit will still enable competition between MNOs, and any other bidders, at the auction to efficiently allocate the spectrum available. The limit applies to the metropolitan area and regional area individually to account for existing asymmetry in spectrum holdings due to the geographical disaggregation of spectrum licences in the 800 MHz band.

Paragraph 7(1)(c) sets out where, immediately prior to any allocation of a spectrum licence that is enabled by the re-allocation declaration a person, or relevant group of persons, holds a relevant spectrum licence that authorises the operation of radiocommunications devices in one or more parts of a metropolitan area (but not the entire metropolitan area), and the aggregate population of that part or those parts of the metropolitan area is insignificant, the relevant spectrum licence is to be treated as if it did not apply in the metropolitan area. That is, these particular existing holdings are not to be taken into account for the purposes of applying the allocation limit provided by this section to a person or specified group of persons in relation to the metropolitan area.

Paragraph 7(2)(a) defines, for the purposes of paragraph (1)(c), a **relevant spectrum licence** to mean a spectrum licence in the 800 MHz band that is in force immediately before the deadline for applications for registration under the allocation procedures.

Paragraphs 7(2)(b) and 7(2)(c) provide that the population of one or more parts of the metropolitan area is **insignificant** if, and only if, the population of those parts of the metropolitan area are less than 15% of the total population of the metropolitan area,

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determined in accordance with the HCIS – List of Population document published by ACMA on its website, as that document existed at the time this instrument was made.

The intention of paragraph 7(1)(c) and subsection 7(2) is that a person's existing entitlement to use a part of the spectrum under a relevant spectrum licence, in one or more parts of the metropolitan area, should be considered insignificant and should not impact on that person's ability to acquire additional spectrum in the metropolitan area where they have a reach of less than 15 per cent of the total population of the metropolitan area in that particular part of the spectrum.

The boundaries of the metropolitan area and regional area may not align with the boundaries of existing spectrum licences in the 800 MHz band. The intent of this subsection is to clarify the application of the allocation limits in any areas where these licence boundaries may overlap.

For example, if:

- a person was entitled to use part of the spectrum in the 800 MHz band under a spectrum licence; and
- the licence area overlapped partly with the metropolitan area for the purposes of the Direction; and
- the population of the part of the licence area which overlaps with the metropolitan area has a population that consists of 11% of the total population of the metropolitan area;

then the person's spectrum holdings in that part of the metropolitan area would not be intended to be taken into account for the purposes of applying the limits to the applicant in relation to the metropolitan area.