Radiocommunications (Allocation of Spectrum Licences by Auction or Pre-determined Price) Determination 2006

Radiocommunications Act 1992

The AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY makes this Determination under section 60 of the Radiocommunications Act 1992.

Dated 21st December 2006

[Signed]

Chris Chapman
Chairman

[Signed]

Lyn Maddock
Deputy Chair

Australian Communications and Media Authority
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Part 1 Preliminary

1.1 Name of Determination
This Determination is the Radiocommunications (Allocation of Spectrum Licences by Auction or Pre-determined Price) Determination 2006.

1.2 Commencement
This Determination commences on the day after it is registered.

1.3 Revocation
The Radiocommunications (Allocation of Spectrum Licences by Auction or Pre-determined Price) Determination 2003 is revoked.

1.4 Application of Determination
(1) This Determination sets out a system for allocating spectrum licences by auction or, if there is only one applicant for a licence or licences, for a pre-determined price.
(2) ACMA may allocate licences in accordance with this Determination only after it has published a notice under subsection 2.1 (1).

1.5 Definitions
(1) In this Determination:
ABN has the same meaning as in the A New Tax System (Australian Business Number) Act 1999.
ACCC means the Australian Competition and Consumer Commission.
ACMA means the Australian Communications and Media Authority.
ACN or ARBN means the relevant registration numbers for a company or body under the Corporations Act 2001.
Applicant Information Package has the meaning given by section 2.4.
application form means the document approved by ACMA under paragraph 2.3 (a).
balance of the bid price means the highest bid made by the successful applicant, as defined in subsection 4.9 (5), less the total of the deposit.
balance of the pre-determined price means the price referred to in section 5.2, less the total of the deposit.
bank transfer, for a payment, means making the payment by electronic funds transfer or by the real time gross settlement electronic payment system operated by the Reserve Bank of Australia.

bid price means the amount of the highest bid by or on behalf of the successful applicant under Part 4.

business day means any day that is not a Saturday or Sunday or a public holiday in the Australian Capital Territory.

cheque means:
(a) a personal cheque; or
(b) a bank cheque issued by a bank licensed to operate in Australia.

closing date means the date and time set by ACMA under paragraph 2.2 (c).

company has the same meaning as in the Corporations Act 2001.

Deed of Acknowledgement means the document approved by ACMA under paragraph 2.3 (b).

deposit means the amount payable by an applicant set by ACMA under paragraph 2.2 (d).

entry fee means the entry fee payable by an applicant set by ACMA under paragraph 2.2 (a).

Form of Authority means the document approved by ACMA under paragraph 2.3 (c).

pre-determined price means the price referred to in section 5.2.

registered applicant means an applicant who is registered under section 3.4.

registered bidder means an individual who is registered under section 4.8.

registrable body has the same meaning as in the Corporations Act 2001.

registration documents means the documents referred to in paragraph 3.1 (1) (a).

reserve price means the price set by ACMA under paragraph 2.2 (b).

successful applicant has the meaning given by subsection 4.9 (5) or subsection 5.3 (1).

verified telephone bidder means an individual or registered applicant whose identity has been verified under subsection 4.6 (4).

(2) Headings and notes used in this Determination do not form part of the Determination.
Part 2 Preparing for the allocation

2.1 Publication of notice by ACMA

(1) Before allocating licences under this Determination, ACMA must publish a notice in any way that ACMA considers appropriate:
   (a) giving a brief description of the licences to be allocated in accordance with this Determination; and
   (b) stating that licences will be allocated in accordance with this Determination and giving a brief description of the way the allocation will be conducted; and
   (c) containing an invitation to apply for the licences to be allocated in accordance with this Determination; and
   (d) stating the closing date and time for applications; and
   (e) stating that further information (the Applicant Information Package) can be obtained from ACMA at the address given in the notice.

(2) If there is a change in a matter mentioned in the notice, ACMA must publish another notice giving details of the change in any way that ACMA considers appropriate.

(3) ACMA may also publish other information about allocations in any way that ACMA considers appropriate.

2.2 Entry fee, reserve price, closing date, deposit and details of licences

Before ACMA publishes a notice under subsection 2.1 (1), ACMA must, in writing, set:
   (a) the amount of the entry fee; and
   (b) the reserve price for each licence; and
   (c) the closing date and time for applications; and
   (d) the amount of the deposit for each licence; and
   (e) details of the licences to be allocated.

2.3 Approval of forms and documents

ACMA must, in writing, approve the following documents:
   (a) an application form;
   (b) a Deed of Acknowledgment;
   (c) a Form of Authority.
2.4 Applicant Information Package

(1) The Applicant Information Package must contain the following information and documents:
   (a) a guide to the allocation process;
   (b) this Determination;
   (c) an application form, with instructions for completing and lodging the form;
   (d) a Deed of Acknowledgement;
   (e) a Form of Authority;
   (f) the amount of the entry fee set by ACMA under paragraph 2.2 (a);
   (g) the reserve price set by ACMA under paragraph 2.2 (b);
   (h) the closing date and time set by ACMA under paragraph 2.2 (c);
   (i) the amounts of the deposits set by ACMA under paragraph 2.2 (d);
   (j) the details of the licences to be allocated, as set out by ACMA at paragraph 2.2 (e).

(2) The Applicant Information Package may also contain other information about the allocation.

2.5 Payments of monies due to ACMA

(1) All payments to ACMA on behalf of the Commonwealth must be made in Australian currency.

(2) Monies due to ACMA on behalf of the Commonwealth for the following purposes must be paid by the date required by this Determination and in accordance with this Determination:
   (a) the entry fee;
   (b) the deposit;
   (c) the balance of the bid price;
   (d) the balance of the pre-determined price.

(3) Monies due to ACMA on behalf of the Commonwealth for any of the purposes set out in subsection (2) must be paid:
   (a) by cheque; or
   (b) by bank transfer.

(4) If a payment is required to be made by a specific date, it is sufficient if, by that date, either:
   (a) if paying by cheque — the applicant:
       (i) has done everything necessary to make the payment; and
       (ii) has given ACMA, on behalf of the Commonwealth, a cheque for the amount of the payment; or
   (b) if paying by bank transfer — the applicant:
       (i) has done everything necessary to make the payment; and
Section 2.5

(ii) has given ACMA, on behalf of the Commonwealth, evidence that the payment has been made.

(5) A payment by bank transfer must be paid into the following bank account:

(a) Bank — Reserve Bank of Australia;
(b) Branch — Canberra City;
(c) BSB number — 092-009;
(d) Account number — 922765;
(e) Account name — ACMA Official Administered Receipts Account.

(6) The applicant must pay all bank charges and Government duties imposed on a payment, and a payment will not be regarded as having been made unless the full amount net of those charges is received by ACMA on behalf of the Commonwealth.
Part 3  Registering for an allocation

3.1 Applications
(1) A person who wants to be allocated a spectrum licence or licences under this Determination must, by the closing date:
   (a) give ACMA the following documents (the registration documents):
       (i) a completed application form;
       (ii) an executed Deed of Acknowledgement; and
   (b) pay the entry fee in accordance with section 2.5; and
   (c) pay the deposit for each licence in accordance with section 2.5.

(2) If the person does not:
   (a) lodge the registration documents with the Canberra office of ACMA on or before the closing date; and
   (b) make the payments in accordance with section 2.5 on or before the closing date;

   the person’s application ceases to have effect and the person is not entitled to take part in the allocation or to obtain a licence under the allocation.

3.2 Refund and forfeit of deposit
(1) The deposit will be refunded if the applicant withdraws the applicant’s application before the commencement of the auction.

(2) The deposit will be refunded if the applicant is not a successful applicant for the licence.

(3) The deposit is forfeited if the applicant defaults in respect of the applicant’s obligations under section 6.3.

(4) The deposit will be refunded if the applicant withdraws the applicant’s application following the offer of a licence for a pre-determined price.

3.3 Confirmation of receipt of applications
As soon as practicable after receiving the registration documents, ACMA must confirm receipt in writing noting particulars of:
   (a) the applicant’s name; and
   (b) the applicant’s address; and
   (c) if the applicant is a company or a registrable body — the applicant’s ABN, ACN or ARBN.
### 3.4 Register of applicants

1. ACMA must maintain a register of applicants.
2. The register may be in electronic form.
3. For each applicant, the register must contain details of:
   a. the name and address of the applicant; and
   b. the applicant’s telephone and facsimile numbers; and
   c. if the applicant is a company or a registrable body — the applicant’s ABN, ACN or ARBN.
4. The register may also contain any other information that ACMA considers necessary for the running of the allocation.
5. ACMA must make the changes to the register that ACMA considers necessary or convenient as soon as practicable after:
   a. an applicant tells ACMA of any change of name, address, or telephone or facsimile numbers; or
   b. ACMA becomes aware that any information on the register is not correct.
6. Except as authorised by this Determination, or as otherwise authorised by law, ACMA must ensure that any details about applicants are not disclosed until the allocation is finalised.
7. Before the start of an auction, ACMA may, in any manner it considers appropriate, publish the name of each registered applicant and the licences for which the applicant is eligible to bid.

### 3.5 Registration of applicants

ACMA must register an applicant only if the applicant has:
1. lodged completed registration documents; and
2. paid the entry fee in accordance with paragraph 3.1 (1) (b); and
3. paid the deposit or deposits in accordance with paragraph 3.1 (1) (c).

### 3.6 Initial assessment of applications

1. Within 15 business days after the closing date, ACMA must:
   a. consider each application; and
   b. decide whether a licence or licences can be allocated without having to conduct an auction.
2. In deciding for subsection (1) whether ACMA may be able to allocate licences without an auction, ACMA may have regard only to:
   a. the applicant’s indication, in the application form, of the licences the applicant wishes to be allocated; and
(b) any other information about the licences applied for that the applicant provides to ACMA.

(3) ACMA may offer to allocate a licence to an applicant at a frequency range other than the frequency range that the applicant has applied for. If the applicant accepts the offer, ACMA will proceed to allocate the licence in accordance with Part 5. If the applicant does not wish to accept the offer, the allocation will proceed in accordance with Part 4.

3.7 Allocation of licences by auction or pre-determined price

(1) If ACMA concludes that it can allocate a licence or licences without having to conduct an auction, it will proceed to allocate the licence or licences in accordance with Part 5.

(2) If ACMA concludes that the licences applied for cannot be allocated without having an auction, ACMA will proceed to allocate the licences in accordance with Part 4.
Part 4  Allocation by auction where there is more than one applicant for a licence

Section 4.1

4.1 Application of Part 4
This Part applies if there is more than one applicant for a licence and ACMA concludes under subsection 3.7 (2) that the licence cannot be allocated without having an auction.

4.2 Holding an auction
ACMA must set the starting time, date and place of the auction to allocate the licence in accordance with this Determination.

4.3 Appointment of auctioneer
ACMA must appoint a person as auctioneer to conduct the auction.

4.4 Notice to applicants
(1) Within 15 business days after the closing date, ACMA must give each registered applicant for the licence:
   (a) a notice setting out:
       (i) that there is more than one applicant for the licence; and
       (ii) that ACMA will conduct an auction in relation to the licence; and
       (iii) the licence or licences for which the applicant is eligible to bid; and
       (iv) the date by which the applicant must confirm the applicant’s intention to participate in the auction and by which a Form of Authority must be lodged; and
       (v) whether ACMA will allow telephone bidding at the auction; and
       (vi) the starting time and date and place of the auction; and
       (vii) the time that bidder registration will commence; and
   (b) a Form of Authority to be completed for each person authorised by the applicant to represent the applicant at the auction.

   Note Only individuals may bid at an auction. If an applicant is a company, or if an applicant wishes another individual to represent them at the auction, then a Form of Authority must be lodged for each individual authorised to act on behalf of the applicant.

(2) ACMA:
   (a) may change the details of information mentioned in paragraph (1) (a); and
   (b) must tell all affected applicants of the change, in writing, as soon as practicable after making the change.
(3) ACMA must not change the starting date of the auction to an earlier date.

4.5 Confirmation of intent to participate in auction
(1) By the date specified in subparagraph 4.4 (1) (a) (iv), the applicant must either:
   (a) give ACMA:
      (i) written confirmation of the applicant’s intention to participate in
          the auction; and
      (ii) a Form of Authority (if necessary); and
      (iii) written notification of the applicant’s wish to bid by telephone (if
            allowed); or
   (b) advise ACMA in writing that the applicant’s application has been
       withdrawn.
(2) If the applicant fails to comply with subsection (1), the applicant is taken to have withdrawn the application.
(3) It is the applicant’s responsibility to ensure that ACMA has received the documents mentioned under subsection (1) by the date specified.

4.6 Telephone bidding
(1) ACMA may allow bidding at an auction to be conducted by telephone.
(2) Registered applicants who wish to bid by telephone must advise ACMA in accordance with subparagraph 4.5 (1) (a) (iii).
(3) If telephone bidding has been allowed, ACMA will issue to each registered applicant, or individual for whom a Form of Authority has been submitted, who wishes to bid in such a manner, a password and a four digit identification number which the registered applicant or authorised individual must provide to ACMA immediately before the commencement of the auction to verify the applicant’s identity.
(4) If the identity of a registered applicant or an authorised individual is verified in accordance with subsection (3), the registered applicant or authorised individual becomes a verified telephone bidder.

4.7 Lodgement of another Form of Authority
If:
   (a) a registered applicant wishes to have an individual represent the applicant at an auction; and
   (b) the individual is not a person for whom the applicant has given ACMA a Form of Authority under subparagraph 4.5 (1) (a) (ii);
the applicant must give ACMA a duly completed Form of Authority for the individual not later than 2 hours before the starting time of the auction.
Section 4.8

4.8 Bidder identification as a registered bidder

(1) A registered applicant, or any individual in respect of whom a Form of Authority has been lodged by a registered applicant, who wishes to bid at the auction in person must register as a bidder (a registered bidder) and must present to ACMA no later than one hour before the commencement of the auction evidence of that person’s identity.

(2) For the purposes of subsection (1), an Australian driver’s licence or a passport will be sufficient evidence of that person’s identity.

(3) On registering a person as a bidder, ACMA must give each registered bidder a bidder’s paddle.

4.9 Bidding in an auction

(1) Only a registered bidder or a verified telephone bidder may bid for a licence.

(2) A registered bidder or verified telephone bidder may bid for a licence only:
   (a) if:
      (i) the registered bidder or verified telephone bidder is the registered applicant; or
      (ii) the registered applicant has provided ACMA with a Form of Authority for the registered bidder or the verified telephone bidder under subparagraph 4.5 (1) (a) (ii) or section 4.7; and
   (b) if the applicant has not withdrawn the applicant’s application; and
   (c) if the licence is for the area and frequency nominated by the registered applicant in the registration documents; and
   (d) if a deposit has been paid for the licence; and
   (e) if the registered applicant has not accepted an offer under subsection 3.6 (3) for a licence allocated under Part 5 at an alternative frequency range.

(3) The auctioneer will:
   (a) invite bids for the licence; and
   (b) identify the registered bidder or verified telephone bidder who makes the highest bid for the licence.

(4) In the event of a disputed bid:
   (a) the auctioneer is the sole arbiter; and
   (b) the auctioneer’s decision is final.

(5) If the highest bid made for a licence is at least equal to the reserve price for the licence, the registered applicant by or for whom the highest bid is made is the successful applicant for the licence.
4.10 Identification and verification to ACMA
Immediately after a registered bidder or a verified telephone bidder is identified as the highest bidder:
(a) if the highest bidder is a registered bidder — the highest bidder must meet with ACMA to identify himself or herself to ACMA; or
(b) if the highest bidder is a verified telephone bidder — the highest bidder must verify the successful applicant’s identification by telephone.

4.11 Close of auction
(1) The auction in relation to a particular licence is closed after the highest bidder has identified himself or herself to ACMA.
(2) ACMA will notify each successful applicant for each licence, by receipted mail, of the balance of the bid price.
(3) A successful applicant must pay the balance of the bid price within 10 business days after the date of the notice in accordance with section 2.5.

4.12 Licence offered at auction but not allocated
(1) Subject to subsection (2), if a licence is not allocated at the auction, applications for that licence cease to have effect.
(2) If:
   (a) a successful applicant is in default of the applicant’s financial obligations to ACMA; and
   (b) the licence is treated as unallocated in accordance with paragraph 6.3 (1) (d);
ACMA may, with the consent of an unsuccessful applicant, treat the registration documents lodged by an unsuccessful applicant in relation to that particular licence as valid registration documents in any future allocation under this Determination.

4.13 Refund of deposit
ACMA must refund the deposits to all unsuccessful applicants or applicants who have withdrawn or who are taken to have withdrawn from an auction under section 4.5 as soon as practicable.
Part 5  Allocation of a licence by pre-determined price

5.1 Application of Part 5
This Part applies if ACMA concludes under subsection 3.7 (1) that it can allocate a licence or licences for which an applicant has applied without having to conduct an auction.

5.2 Amount of pre-determined price
For the purposes of this Part, the pre-determined price for a licence is the reserve price for the licence.

5.3 Notice to registered applicant
(1) Each registered applicant to whom a licence can be allocated under Part 5 is the successful applicant for the licence.

(2) As soon as practicable after the closing date, ACMA must give each successful applicant a notice, by receipted mail, setting out:
   (a) that the applicant is the successful applicant for the licence; and
   (b) the amount of the balance of the pre-determined price for the licence.

(3) Within 10 business days after the date of the notice, the successful applicant must either:
   (a) pay the balance of the pre-determined price for the licence in accordance with section 2.5; or
   (b) advise ACMA in writing that the application has been withdrawn.

5.4 Default by a successful applicant
If a successful applicant, whose application has not been withdrawn, fails to comply with paragraph 5.3 (3) (a), the application ceases to have effect and the applicant is not entitled to be allocated the licence. The auction deposit will be refunded as soon as practicable.
Part 6 Issue of a licence to a successful applicant

6.1 Form of licence
(1) The licence must be substantially in accordance with the sample licence in the relevant marketing plan.

(2) The licence comes into force on the day that is specified in the licence as the day it comes into force.

(3) The licence remains in force for the period specified in the licence.

Note This is a maximum of 15 years: see section 65 of the Act.

6.2 Issue of licence to successful applicant
(1) Subject to subsection (2), the successful applicant must be issued a licence if the successful applicant:
   (a) pays the balance of the bid price for the licence in accordance with subsection 4.11 (3); or
   (b) pays the balance of the pre-determined price in accordance with paragraph 5.3 (3) (a).

Note In issuing the licence, ACMA must comply with Part 3.2 of the Act.

(2) If ACMA has terminated an advertised allocation under section 7.5, all successful applicants cease to be entitled to be issued a licence.

6.3 Liability for failure to comply with auction payment requirements
(1) If a successful applicant does not pay the balance of the bid price in accordance with this Determination:
   (a) the applicant ceases to be entitled to be allocated the licence; and
   (b) the deposit is forfeited to ACMA on behalf of the Commonwealth; and
   (c) the applicant is taken to be in default of the applicant’s financial obligations to ACMA on behalf of the Commonwealth under this Determination and is liable to pay to ACMA on behalf of the Commonwealth the default amount which must be 10 percent of the balance of the bid price; and
   (d) the licence may be treated as an unallocated licence under section 4.12.
Section 6.3

(2) The total of the default amount payable to ACMA on behalf of the Commonwealth under this section is:
   (a) a debt due to ACMA on behalf of the Commonwealth; and
   (b) recoverable by ACMA on behalf of the Commonwealth from the successful applicant in a court of competent jurisdiction.
Part 7  Miscellaneous

7.1 ACMA not liable on behalf of the Commonwealth under the allocation system
ACMA is not liable on behalf of the Commonwealth to pay damages or costs arising from an act or omission of any person in relation to the allocation procedures set out in this Determination.

7.2 Information provided by applicant
(1) A document given to ACMA by a person for the purposes of the allocation procedures set out in this Determination (including a document that contains intellectual property) becomes the property of the Commonwealth for the benefit of ACMA.
(2) Subsection (1) does not apply to a document that is given to ACMA to establish an individual’s identity.
(3) ACMA may use information provided by an applicant for the purposes of ACMA.
(4) Where the ACCC has requested specified information in relation to any applicant, ACMA must provide that information to the ACCC.

7.3 Recovery of damages by ACMA or the Commonwealth
This Determination does not affect any right of action or remedy that ACMA or the Commonwealth has or may have against any person which arose or arises under the Deed of Acknowledgement, statute, common law, equity or otherwise.

7.4 Giving of information by ACMA
ACMA may announce, or publish a notice of:
(a) the name of each person to whom a licence is to be issued; and
(b) the price bid or paid for the licence.

7.5 Termination of an advertised allocation
ACMA may terminate an advertised allocation under this Determination at any time before a licence is issued if ACMA considers it is appropriate to do so.
7.6 Refund of payments to ACMA

If ACMA terminates an allocation under section 7.5, ACMA must refund:
(a) any entry fee paid by an applicant under paragraph 3.1 (1) (b); and
(b) any deposit paid under paragraph 3.1 (1) (c); and
(c) the balance of the pre-determined price paid for a licence under paragraph 5.3 (3) (a); and
(d) the balance of the bid price paid for a licence under subsection 4.11 (3).