EXPLANATORY STATEMENT

Radiocommunications Act 1992

Radiocommunications (Spectrum Licence Limits) Direction No. 2 of 2012 (Amendment No. 1 of 2012)

Issued by the authority of the Minister for Broadband, Communications and the Digital Economy

Authority

Subsection 60(10) of the *Radiocommunications Act 1992* (the Act) provides that the Minister for Broadband, Communications and the Digital Economy (the Minister) may give written directions to the Australian Communications and Media Authority (ACMA) in relation to the exercise of the power to determine procedures imposing a limit mentioned in subsection 60(5) of the Act.

Purpose

The purpose of this Direction is to amend the *Radiocommunications (Spectrum Licence Limits) Direction No. 2 of 2012* (the Principal Direction) to clarify the scope of the term 'associate' as used in the Principal Direction.

Background

On 1 November 2011, the Minister declared the following ranges of spectrum in the 2.5 GHz band to be re-allocated by issuing spectrum licences (*Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2011*):

- 2500 MHz to 2570 MHz; and
- 2620 MHz to 2690 MHz.

On 2 February 2012, the Minister made the Principal Direction, following consultation with the Australian Competition and Consumer Commission (ACCC) and the ACMA. The Principal Direction directs the ACMA to determine procedures under subsection 60(10) of the Act that impose limits on the amount of spectrum that any one person or specified groups of persons may use as a result of the allocation of spectrum licences under Subdivision B of Part 3.2 of the Act in the 2.5 GHz band (no more than 2 × 40 MHz of the total 2 × 70 MHz that is being made available for allocation).

The ACMA is required to reallocate the radiofrequency spectrum in the 2.5 GHz band (together with spectrum from the 700 MHz band) by auction, following a direction issued by the Minister to the ACMA on 19 November 2012 (the *Australian Communications and Media Authority (Allocation Procedures – Reserve Prices) Direction No. 1 of 2012*). This auction is due to be conducted in or about April 2013.

Between April 2012 and September 2012, the ACMA publically consulted on draft instruments in relation to the digital dividend auction, including in relation to its draft

determination to be made under sections 60 and 294 of the Act – the *Radiocommunications (Spectrum Licence Allocation — Combinatorial Clock Auction) Determination 2012* (the ACMA Draft Determination). The ACMA Draft Determination used the definition of 'associate' and 'relevant agreement' from the Principal Direction.

Submissions received in response to the ACMA's public consultation expressed concern that there was a lack of clarity around certain aspects of the definition of 'associate' used in the Principal Direction. In particular, issues were raised in relation to the:

- scope of the term 'business partner' as used in paragraphs (a) and (b) of the definition of 'associate'; and
- types of agreements intended to be covered by paragraph (c)(i) of the definition.

In considering the submissions received and after consulting further with the ACMA on the intended scope of the term 'associate' as used in the Principal Direction, the Minister determined the most appropriate course of action is to address these issues by amending the Principal Direction.

Consistent with the Principal Direction, this Direction is a legislative instrument under the *Legislative Instruments Act 2003* but is not subject to disallowance: item 41 of the table in subsection 44(2) of that Act specifies that ministerial directions to any person or body are not subject to disallowance.

Consultation

The ACMA has been consulted in relation to this Direction, following on from the earlier public consultation undertaken by the ACMA, in relation to the ACMA Draft Determination.

Regulatory impact

The Office of Best Practice Regulation has agreed that the regulatory changes arising from the instrument are minor or machinery in nature and that no further regulatory impact analysis is required.

Notes on Sections

Section 1 provides that the name of the Direction is the *Radiocommunications (Spectrum Licence Limits) Direction No. 2 of 2012 (Amendment No. 1 of 2012).*

Section 2 provides that the Direction commences on the day it is made.

Section 3 provides that the Principal Direction is amended as set out in the Schedule to the Direction.

Schedule 1 sets out the amendments to the Principal Direction.

Item [1] amends paragraph (a) of the definition of 'associate' by removing the reference to 'business partner of the body'.

The term ‘business partner’ is not defined in the Principal Direction and no further guidance was provided in relation to the term in the accompanying explanatory statement. The term is not limited to relationships regarding the spectrum subject to the reallocation process. The concern with respect to this term is that it may have the unintended consequence that two parties carrying on a business partnership unrelated to spectrum use may be classified as ‘business partners’ and therefore will be limited in the amount of spectrum each may acquire at auction.

For example, two carriers may have an agreement in relation to a business of providing telecommunications training to the public for which they each share in the profits. Arguably the two carriers will be deemed ‘associates’ due to the breadth of the term ‘business partner’. Such an outcome is contrary to the intent of the competition limits, which is to prevent a monopoly and provide for a level playing field and not to unnecessarily preclude a person from participating in the auction.

The decision was made to remove the reference to ‘business partner’ rather than clarify the meaning of the term or limit its application to relationships involving spectrum use. The term was not considered necessary, as the types of relationships intended to be covered by the term ‘business partner’ will be captured by paragraph (c) of the definition of ‘associate’ (i.e. ‘relevant agreements’).

Item [2] amends paragraph (b) of the definition of ‘associate’ by removing the reference to ‘business partner of the individual’.

The discussion in relation to item [1] is applicable to this item, in the context of an individual rather than a body corporate.

Item [3] amends the definition of ‘associate’ by clarifying that a relevant agreement must be for the use of relevant spectrum rather than relate to the use of that spectrum.

Subparagraph (c)(i) was intended to be narrow in application and capture particular types of uncompetitive relationships designed to monopolize the relevant spectrum band.

This amendment makes it clear that only agreements that concern the actual ‘use of the relevant spectrum’ are captured by this provision – it is not enough that the agreements ‘relate to’ the use of that spectrum. For example, an agreement between two carriers to install and co-share an infrastructure site is clearly outside of this amended definition, as an infrastructure site is required to facilitate the eventual use of spectrum but does not in itself entail the use of spectrum. Spectrum is defined in section 5 of the Act to mean *the range of frequencies within which telecommunications are capable of being made*. Similarly, agreements for the building, installation, design and/or sharing of other infrastructure or associated equipment will not be captured by the amended paragraph (c) of the definition of ‘associate’.

Examples of the types of agreements paragraph (c) is intended to cover are discussed in the explanatory statement to the Principal Direction.

Item [4] inserts a definition of 'carrier' into the Principal Direction, which is referenced in the definitions of 'Roaming Services Agreement' and 'relevant agreement'. The term has the same meaning as in the *Telecommunications Act 1997*.

Item [5] inserts a definition of 'public mobile telecommunications service' into the Principal Direction.

The term 'public mobile telecommunications service' is referenced in the definition of 'Roaming Services Agreement'. The term has the same meaning as in the *Telecommunications Act 1997*.

Item [6] inserts wording to exclude the term 'Roaming Services Agreement' (this defined term is discussed in item [7], below) from being included within the term 'relevant agreement'.

Item [7] inserts a definition of 'Roaming Services Agreement' into the Principal Direction.

The term 'Roaming Services Agreement' is referenced in the definition of 'relevant agreement'. This term is intended to capture agreements between carriers which enable customers (i.e. end-users) of one carrier to roam onto the mobile network of another carrier when the customer is outside the geographical coverage area of the first-mentioned carrier's network. Such use is for temporary periods of time. This amendment has been made to make it clear that such arrangements are not captured by paragraph (c) of the definition of 'associates'. The concern was that such agreements may be considered to be for the use of spectrum even though such arrangements only enable the *customers* of a carrier to temporarily use the spectrum of another carrier. This is not an arrangement which provides one carrier with exclusive use of another carrier's spectrum (so as to monopolize the spectrum band).

If the agreement between two carriers covers matters that extend beyond arrangements in relation to roaming for the use of the relevant spectrum, there will be a risk that the agreement as a whole will be captured by paragraph (c) of the 'associates' definition and therefore limit the amount of spectrum that may be used by the respective parties.