

Australian Communications Authority

Deed of Acknowledgment

NOTES ON COMPLETION

This Deed of Acknowledgment (the 'Deed') has been approved pursuant to section 1.5 of the *Radiocommunications (Spectrum Licence Allocation — 2 GHz Band) Determination 2000* (the 'Determination'). Persons completing this Deed should read the Determination and, if necessary, seek appropriate advice. The Deed affirms the statutory obligations imposed upon applicants by the Determination in respect of their participation in any auction, or allocation of Spectrum Licences for a pre-determined price, conducted under the Determination. The Deed also requires applicants to, in addition to their statutory obligations owed under the Determination, agree to be bound by the same obligations under contract. Prospective applicants should clearly understand these obligations before completing the Deed.

A completed Deed must be submitted with an Application Form by every prospective applicant.

All sections of this Deed must be completed. The prospective applicant(s) referred to in this Deed must be the same as on the related Application Form.

In the event that 2 or more persons decide to apply as joint applicants, then:

- each joint applicant must be named and described at the beginning of the Deed; and
 - each joint applicant must execute the Deed.
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Deed of Acknowledgment

This DEED OF ACKNOWLEDGMENT is made this

Day of

2001

In favour of the AUSTRALIAN COMMUNICATIONS AUTHORITY ('ACA') a body corporate continued in existence under the *Australian Communications Authority Act 1997 (Cth)*

by

(the 'Applicant(s)')

(Insert name and ACN/ARBN if applicable)

of

(Insert address)

PURPOSE:

- A. The Australian Communications Authority ('ACA') proposes to allocate spectrum licences by a simultaneous ascending bid multiple round auction of spectrum allocation lots ('lots') which become the subject of spectrum licences. The ACA has determined the procedures to be applied in allocating spectrum licences by auction, and for a pre-determined price, in the *Radiocommunications (Spectrum Licence Allocation — 2 GHz Band) Determination 2000* (the 'Determination').
- B. The Applicant wishes to submit bids for lots in the auction or be offered the opportunity to acquire a licence by pre-determined price in the event that the ACA considers that it can satisfy the needs of all applicants without proceeding to auction.
- C. The Applicant has agreed to compete for lots, and to participate in any allocation for a pre-determined price, in accordance with the terms and conditions set out in the Determination and in this Deed.

OPERATIVE PART:

PART 1: GENERAL UNDERTAKING

1. ACKNOWLEDGMENT & AGREEMENT THAT APPLICANT WILL BE BOUND

- 1.1 The Applicant understands and acknowledges that it will be bound by the statutory obligations contained in the Determination, and in addition by this Deed agrees to be contractually bound to strictly comply with each and every provision of the Determination.
- 1.2 The remaining clauses of this Deed do not in any way limit this acknowledgment by the Applicant that it will be bound by all applicable statutory obligations contained in the Determination.
- 1.3 The remaining clauses of this Deed supplement, and do not in any way limit, the Applicant's contractual duty to perform or satisfy its statutory obligations contained in the Determination.
- 1.4 Notwithstanding anything in this Deed, neither the Applicant's obligations under this Deed nor the binding effect of this Deed shall in any way be affected or impaired by the Determination or the Deed of Financial Security, or both, being void or otherwise unenforceable in whole or in part.
- 1.5 The Applicant has read and understood each of the following documents:
 - (a) *Radiocommunications (Spectrum Re-allocation) Declaration No. 2 of 2000;*
 - (b) *Radiocommunications (Spectrum Licence Limits — 2 GHz Band) Direction No. 2 of 2000;*
 - (c) *Radiocommunications Spectrum Marketing Plan (2 GHz Bands) 2000;*
 - (d) *Radiocommunications (Spectrum Licence Allocation — 2 GHz Band) Determination 2000;*
 - (e) *Radiocommunications (Unacceptable Levels of Interference — 2 GHz Band) Determination 2000;*
 - (f) *Radiocommunications Advisory Guidelines (Managing Interference from Apparatus-licensed and Class-licensed Transmitters — 2 GHz Band) 2000;*
 - (g) *Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers — 2 GHz Band) 2000;*
 - (h) *The Applicant Information Package (including attachments).*

PART 2: ALLOCATION BY AUCTION

2. SECURITY

- 2.1 The Applicant warrants that it will maintain the security of the encryption code keys, transaction code keys, and any other confidential information provided to it by the ACA.
- 2.2 The Applicant warrants that it will immediately notify the ACA if it forms the view that the security, confidentiality or integrity of the Applicant's encryption code keys or transaction code keys have been compromised.

3. BALANCE OF THE BID PRICE

- 3.1 The Applicant, on becoming the successful applicant in relation to a lot, agrees to pay the balance of the bid price as required by section 5.3 of the Determination.

4. FAILURE TO PAY THE BALANCE OF THE BID PRICE

- 4.1 If on becoming the successful applicant in relation to a lot, the Applicant fails to pay the balance of the bid price as required by section 5.3 of the Determination:
 - (a) the Applicant acknowledges that section 5.4 of the Determination applies and agrees to perform and satisfy its obligations which arise from, or are described in, section 5.4 in the manner set out in the Determination;
 - (b) the Applicant agrees to indemnify the ACA from and against any loss, damage, liability, cost or expense incurred by the ACA in arranging for, and conducting, a re-allocation of the lots which became defaulted lots as a result of the Applicant's failure to pay the balance of the bid price in accordance with section 5.3 of the Determination. This indemnity shall include, but not be limited to:
 - (i) the ACA's legal costs and expenses on a solicitor/own client basis; and
 - (ii) the cost of all time spent or resources used, or disbursements paid, by the ACA.

This right of the ACA to be indemnified is in addition to, and not exclusive of, any other right, power or remedy of the ACA which arises under statute, common law, equity or otherwise; and

- (c) notwithstanding anything in this Deed, the ACA may recover any amount guaranteed or indemnified by the Applicant's Promisor under the Deed of Financial Security, if any, at any time.
- 4.2 The rights and obligations referred to in this clause 4 will survive the expiration or termination of this Deed.

5. LOSS OF ELIGIBILITY

- 5.1 The Applicant acknowledges that under sections 4.18 and 4.19 of the Determination if the Applicant fails to meet its activity targets during a round of an auction its eligibility will be reduced in accordance with the Determination.

6. BIDS

- 6.1 The Applicant acknowledges and agrees that the mechanisms described in the Schedule of the Determination are acceptable to authenticate bids as bids submitted by the Applicant, and that the Applicant will be bound by any bids that satisfy those authentication checks, whether or not those bids were submitted by the Applicant or with the Applicant's authority.
- 6.2 The Applicant acknowledges and agrees that it will be responsible for its acts and omissions, and the acts and omissions of its officers, employees, agents, subcontractors and associates in relation to any bid for a lot.

7. ELECTRONIC BIDDING SOFTWARE

- 7.1 The Applicant agrees to comply with the terms of the software licence (the 'Licence') granted to the Applicant by the ACA for the purpose of participation in the auction. A copy of the Licence is included in the Applicant Information Package.
- 7.2 The Applicant agrees to use the software provided to the Applicant by the ACA only in Australia or only outside Australia as indicated in the version of the Licence applicable to the Applicant, the two places of use being mutually exclusive.

PART 3: ALLOCATION FOR A PRE-DETERMINED PRICE

8. OFFER OF LICENCE

- 8.1 The Applicant acknowledges and agrees that if all applicants either accept spectrum licences offered, or withdraw from the allocation process, in accordance with Part 3 of the Determination, then the ACA will dispense with the need to conduct an auction.

9. PAYMENT OF PRE-DETERMINED PRICE

- 9.1 Upon receipt of confirmation from the ACA that each applicant has either accepted the licence offered or withdrawn from the allocation process, the Applicant agrees to pay the balance of the pre-determined price owed by it in accordance with section 3.4 of the Determination.

10. FAILURE TO PAY THE BALANCE OF THE PRE-DETERMINED PRICE

- 10.1 If the Applicant does not pay the balance of the pre-determined price for a licence, then the Applicant acknowledges and agrees that section 3.7 of the Determination applies.

PART 4: GENERAL

11. BIDDING LIMITS

- 11.1 The Applicant acknowledges the effect of the provisions of Part 1A of the Determination.

12. ADDITIONAL PERFORMANCE PAYMENT OR FURTHER DEED OF FINANCIAL SECURITY

- 12.1 The Applicant acknowledges the effect of the provisions of section 4.25 of the Determination and agrees to pay to the ACA any additional performance payment or enter into another Deed of Financial Security if section 4.25 applies to the Applicant during the auction.

13. NO RELIANCE

- 13.1 The Applicant undertakes that it has made its own independent inquiries about the use and effectiveness of all spectrum licences in lots for which it will submit bids in the auction or wishes to have allocated. The Applicant acknowledges that it has not relied on any representation made by the ACA or its officers, employees or agents in relation to its application for, or the allocation of, a spectrum licence.

14. RELEASE AND INDEMNITY

- 14.1 The Applicant agrees to indemnify the ACA from and against any:

- (a) liability sustained or incurred by the ACA; or
- (b) costs or expenses incurred by the ACA in enforcing the Deed of Financial Security given to the ACA for the Applicant under the Determination; or
- (c) loss of or damage to property of the ACA; or
- (d) loss or expense sustained or incurred by the ACA in dealing with any claim against it including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used or disbursements paid by the ACA;

arising from:

- (e) any act or omission by the Applicant, its officers, employees, agents, subcontractors or associates in connection with the Applicant's participation in an allocation process conducted under the Determination;
- (f) any breach by the Applicant of its obligations or warranties under this Deed, or the Determination, or both;

irrespective of whether there was fault on the part of the person whose conduct gave rise to that liability, loss or damage, or loss or expense.

- 14.2 The Applicant's liability to indemnify the ACA under clause 14.1 will be reduced proportionately to the extent that any negligent act or omission of the ACA contributed to the relevant liability, loss or damage, or loss or expense.
- 14.3 The right of the ACA to be indemnified under this clause 14 is in addition to, and not exclusive of, any other right, power or remedy of the ACA which arises under statute, common law, equity or otherwise.
- 14.4 The Applicant releases the ACA from and against all demands, claims, actions or proceedings arising from the acts or omissions of any person in relation to the allocation procedures set out in the Determination.
- 14.5 The rights and obligations referred to in this clause 14 will survive the expiration or termination of this Deed.

15. JOINT AND SEVERAL LIABILITY

- 15.1 Where two or more persons have executed this Deed as joint Applicants the liability of each person under this Deed is both joint and several.
- 15.2 If it is found to be an associated applicant for the purposes of Part 1A of the Determination, the Applicant agrees that it will be jointly and severally liable for any liability owed to the ACA by an applicant with whom the Applicant is associated.

16. APPLICANT MUST MEET ITS OWN COSTS

- 16.1 The Applicant agrees that its participation in any stage of procedures referred to in the Determination shall be at its sole risk, cost and expense.

17. CONFIDENTIAL INFORMATION

- 17.1 The Applicant and its respective officers, employees, agents, advisers and associates must not take steps to obtain, or use in any unauthorised way, or disclose confidential information of the ACA relating to the ACA's activities or the auction process other than information which is publicly available or made available by the ACA to registered applicants during the auction process.

18. RETURN OF INFORMATION TO THE ACA

- 18.1 The ACA reserves the right, in its absolute discretion, to require that any written information provided to the Applicant (and copies of the information) be returned to the ACA at any stage, at the Applicant's sole expense.

19. CONFLICT OF INTEREST

- 19.1 The Applicant and its respective officers, employees, agents, advisers and associates for the purposes of Part 1A of the Determination, must not place themselves in a position which may, or does, give rise to a conflict of interest (or a potential conflict of interest) between the interests of the ACA (on the one hand) and any other interests (on the other hand) during the auction process.

20. ACA COMPUTERS AND COMMUNICATIONS FACILITIES

- 20.1 The Applicant acknowledges that any unauthorised and intentional access, destruction, alteration, addition, or action which impedes access to or impairs the usefulness of information stored in any ACA computer may be an offence under Part VIA of the *Crimes Act 1914 (Cth)*. The Applicant acknowledges that contravention of Part VIA may attract a substantial penalty, including imprisonment.

21. GOVERNING LAW

- 21.1 This Deed is governed by the laws in force in the Australian Capital Territory.
- 21.2 The Applicant irrevocably submits to the non exclusive jurisdiction of the courts of the Australian Capital Territory and of the Commonwealth of Australia.

22. DEFINITIONS AND INTERPRETATION

- 22.1 This Deed shall be interpreted in accordance with the provisions of the Determination, the *Radiocommunications Act 1992* (the 'Act'), and the Minister's Direction under sub-section 60(10) of that Act (the 'Direction') relating to the Determination. Unless otherwise provided, terms in this Deed shall have the same meanings as provided in that Determination, Direction or Act. In particular, 'associate' has the same meaning as provided in Part 1A of the Determination.
- 22.2 In this Deed, unless the contrary intention appears:
- (a) Words importing a gender include any other gender.
 - (b) Words in the singular number include the plural and words in the plural number include the singular.
 - (c) A reference to any statute or other legislation (whether primary or subordinate) is to a statute or other legislation of the Commonwealth as amended or replaced from time to time.
 - (d) 'ACA' includes the officers, employees, subcontractors and agents of the ACA.

23. NO VARIATION UNLESS AGREED

- 23.1 No variation of this Deed is binding unless it is agreed in writing between the Applicant and the ACA.

EXECUTED AS A DEED

[If more than 1 person are applying as joint applicants then each person should complete an appropriate execution block.]

[Appropriate execution block if the Applicant is an individual:]

SIGNED, SEALED AND)
DELIVERED)

)

by _____) *Signature* _____
(Print Name of the Applicant)

in the presence of)

)

_____) *Signature* _____
(Print Name)

[Appropriate execution block if the Applicant is a company:]

SIGNED, SEALED AND DELIVERED

for and on behalf of

(Print Name of the Company)

ACN or ARBN _____

(Print ACN or ARBN)

by authority of the Directors:

(Print name of Director)

(Print name of Director/Secretary)

(Signature of Director)

(Signature of Director/Secretary)

[If the Applicant is a statutory authority or other body corporate, then please execute in the appropriate manner a Deed.]