

Form 6—Deed of financial security

For the purposes of the Radiocommunications (Spectrum Licence Allocation – 3.6 GHz Band) Determination 2018.

Notes on completion

Introduction

This deed of financial security form has been approved by the Australian Communications and Media Authority (the ACMA) pursuant to paragraph 27(1)(m) of the Radiocommunications (Spectrum Licence Allocation – 3.6 GHz Band) Determination 2018 (the Allocation Declaration).

Sections 29 and 38 of the Allocation Determination provide that an applicant must, before the eligibility deadline, secure its initial eligibility points by:

- > making an eligibility payment of an amount to the ACMA on behalf of the Commonwealth; or
- > giving the ACMA on behalf of the Commonwealth a deed of financial security, which has been completed in the approved form and executed, for an amount; or
- > making an eligibility payment of part of an amount and giving a deed of financial security for the remainder.

Under section 35, an applicant may also give a deed of financial security.

Applicants must use this deed of financial security form for the purposes of sections 29, 35 and 38 of the Allocation Determination where they propose to give the ACMA a deed of financial security for all or part of an amount. Section 38 contains further requirements in relation to the deed of financial security.

Who can be the Promisor

The Promisor who makes a deed of financial security must be one of the following:

- > an authorised deposit-taking institution within the meaning given by the *Banking Act 1959*;
- > a person authorised to carry on business in Australia as an insurer under the *Insurance Act 1973*;
- > a Lloyd's underwriter authorised to carry on insurance business under Part VII of the *Insurance Act 1973*.

Working out the amount secured by the deed of financial security

The information needed to calculate the amount secured by the deed of financial security (that is, the amount to be inserted at clause 1.1 of the deed) is included in the eligibility nomination form.

The amount required to be secured by the deed of financial security is the amount calculated by reference to:

- > the number of initial eligibility points specified by the applicant in the eligibility nomination form multiplied by the dollar value of each initial eligibility point for the primary stage of the auction set by the ACMA under paragraph 28(1)(a) of the Allocation Determination,
- > less any eligibility payment made by the applicant to the ACMA on behalf of the Commonwealth under paragraph 29(2)(b), subsection 35(6) or section 38 of the Allocation Determination.

The amount inserted in clause 1.1 of the deed of financial security must be the same as the amount inserted by the applicant at Option 1 of Part 4 of the eligibility nomination form.

When to give the deed of financial security to the ACMA

If a deed of financial security is given to the ACMA for the purposes of section 29 of the Allocation Determination, it must be given to the ACMA before the eligibility deadline. If section 35 applies, the deed of financial security must be given to the ACMA before the eligibility deadline or, if the ACMA agrees to a later time, the agreed time. An applicant is taken to have withdrawn the application if the applicant fails to make an eligibility payment or give a deed of financial security before the eligibility deadline or the later time (if applicable). The eligibility deadline is included in the *Auction guide*.

How to give the deed of financial security

The deed of financial security must be given to the ACMA in accordance with the procedures for giving documents set out in the Allocation Determination.

A summary of the procedures (including an email address, fax number and physical address for the lodgements) is provided at the beginning of the *Auction forms* booklet. The procedures are also summarised under the heading 'Giving documents to the ACMA' in the *Auction guide*. The procedures contain specific requirements where a document is lodged by email or fax.

Additional procedures apply in relation to giving a deed of financial security. Where a deed of financial security is given to the ACMA by email or fax before the eligibility deadline, the original document 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, by the agreed time) for the deed to be taken to have been given to the ACMA.

Who should execute and witness the deed of financial security?

A deed of financial security must be executed by:

- > an authorised deposit-taking institution within the meaning given by the *Banking Act 1959*;
- > a person authorised to carry on business in Australia as an insurer under the *Insurance Act 1973*;
- > a Lloyd's underwriter authorised to carry on insurance business under Part VII of the *Insurance Act 1973*.

An applicant is taken to have withdrawn its application if the ACMA is not satisfied that the person executing the deed of financial security is such a person.

Where the deed is executed by a body corporate, it must be executed by:

- > two directors;
- > a director and a company secretary;
- > if it is a proprietary company that has a sole director who is also the company secretary, that director; or
- > a person acting under a power of attorney for a body corporate.

If the deed is executed by a person acting under a power of attorney for a body corporate:

- > the applicant must give the ACMA a copy of the power of attorney with the deed; and
- > the execution of the deed must be witnessed by a person who is above the age of 18 and is not a party to the deed.

Deed of financial security

This deed of financial security is made on this

_____ 2018
day of month

in favour of the Commonwealth of Australia (the Commonwealth) to the benefit of the Australian Communications and Media Authority, ABN 55 386 169 386, (the ACMA) established under the *Australian Communications and Media Authority Act 2005*,

by:

Insert name

Insert ACN or ARBN if applicable

of:

Insert address

(the Promisor) in relation to the allocation of spectrum licences, and an application for registration as a bidder in an auction, under the Radiocommunications (Spectrum Licence Allocation – 3.6 GHz Band) Determination 2018 (the Allocation Determination).

On behalf of the Applicant:

Insert name

Insert ACN or ARBN if applicable

of:

Insert address

Purpose:

- A. The ACMA has made the Allocation Determination under subsections 60(1) and 294(1) of the *Radiocommunications Act 1992*.
- B. The Applicant has given, or intends to give, the ACMA an application form under the Allocation Determination and proposes to be registered as a bidder in the auction.
- C. The Promisor provides this deed of financial security for the purposes of, and in accordance with, section 29, section 35 or section 38 of the Allocation Determination.
- D. In giving this Deed, the Promisor relies solely on its own judgment and does not rely on any representations or warranties made to it or to any other person by the ACMA or the Commonwealth.

1. Financial undertaking

- 1.1 The Promisor unconditionally and irrevocably undertakes and covenants to pay to the ACMA on behalf of the Commonwealth immediately on demand in writing, without reference to the Applicant, and notwithstanding any notice given by the Applicant not to pay the same, and irrespective of the performance or non-performance by the Applicant under the Allocation Determination, any sum or sums which may from time to time be demanded in writing by the ACMA on behalf of the Commonwealth of a dollar amount not exceeding the Amount in aggregate. The Amount is:

Insert amount

\$

- 1.2 The Promisor is not to make any inquiry as to the grounds of the ACMA's demand under clause 1.1.
- 1.3 The Promisor's obligations under this Deed are continuing obligations and continue in full force and effect until either:
- a. the Chair of the ACMA, by written notice to the Promisor, has cancelled the undertaking under clause 1.1; or
 - b. the Promisor has made payment to the ACMA on behalf of the Commonwealth of the whole of the Amount.
- 1.4 In addition to clause 1.1, the Promisor may, at any time in its discretion, pay unconditionally to the ACMA on behalf of the Commonwealth the whole of the amount referred to in clause 1.1 (or, if applicable, that whole amount less any amount already paid to the ACMA on behalf of the Commonwealth pursuant to this Deed), and in such circumstances:
- a. the Promisor's liability to pay under clause 1.1 is deemed to be fully satisfied; and
 - b. the Promisor, at and from the time of such payment, is deemed to have relinquished all rights and interests in the amount paid.

- 1.5 Any notice by the ACMA or the Commonwealth to the Promisor about this undertaking will be deemed to have been duly given or served if it is in writing and purports to be signed for and on behalf of the ACMA or the Commonwealth and is either delivered by hand or posted in a letter addressed to the Promisor at its above address. Any notice to the ACMA or the Commonwealth is to be deemed to have been duly given or served if it is in writing signed by or on behalf of the Promisor and is either delivered by hand or posted in a letter addressed to:

Auction Manager
Major Spectrum Allocation Section
Australian Communications and Media Authority
Red Building, Benjamin Offices, Chan Street
Belconnen ACT 2617

2. No discharge

- 2.1 Neither the Promisor's obligations under this Deed nor the binding effect of this Deed are in any way be affected, waived or impaired by any of the following:
- a. any furnishing to, or acceptance by, the ACMA or the Commonwealth of additional security;
 - b. any release by the Chair of the ACMA of any security (except this Deed);
 - c. any waiver, compromise, forbearance, abandonment, renewal, consent or other action or inaction or any exercise or non-exercise by the ACMA or the Commonwealth of any right, remedy or power (including the granting of any time or indulgence) with respect to the Promisor or the Applicant (whether with or without the consent of the Promisor);
 - d. any insolvency, bankruptcy, reorganisation, arrangement, composition, liquidation or dissolution of, or appointment of a liquidator and/or receiver, receiver and manager or administrator to, the Promisor or the Applicant;
 - e. any amendment of the Allocation Determination or deed of acknowledgement with or without the consent of the Promisor;
 - f. the Allocation Determination or the deed of acknowledgment, or both, being void or otherwise unenforceable in whole or in part; or
 - g. the revocation of the Allocation Determination or the termination of the deed of acknowledgment, or both.
- 2.2 For the avoidance of doubt, no variation to the terms of the Allocation Determination or deed of acknowledgment will increase the liability of the Promisor under this Deed without the Promisor's prior consent or confirmation.

3. Representations and warranties

- 3.1 The Promisor represents and warrants that:
- a. it is one of the following:
 - i. an authorised deposit-taking institution, within the meaning of the *Banking Act 1959*;
 - ii. a person authorised to carry on business in Australia as an insurer under the *Insurance Act 1973*;
 - iii. a Lloyd's underwriter authorised to carry on insurance business under Part VII of the *Insurance Act 1973*;
 - b. it is a duly organised and validly existing legal entity and it has the power and authority to execute and deliver this Deed and to carry out its terms and conditions; and

- c. the execution, delivery and performance by the Promisor of this Deed does not:
- i. contravene any law applicable to it; or
 - ii. contravene any provision of the Constitution, Charter, Memorandum or Articles of Association, or any instrument or law, constituting or defining the Promisor or for the governance of the Promisor.

4. Severability

- 4.1 If any provision of this Deed is invalid and not enforceable in accordance with its terms, all other provisions that are capable of separate enforcement without regard to the invalid provision are, and continue to be, valid and enforceable in accordance with their terms.

5. Governing law and jurisdiction

- 5.1 This Deed is to be construed and take effect in accordance with the laws in force in the Australian Capital Territory and the Commonwealth of Australia, and any dispute relating to the construction, meaning or effect of this Deed is governed by those laws.
- 5.2 The Promisor irrevocably submits to the jurisdiction of the courts of the Australian Capital Territory and the Federal Court of Australia.
- 5.3 The submission to the jurisdiction of the courts of the Australian Capital Territory and the Federal Court of Australia is exclusive except in so far as the High Court of Australia has jurisdiction to hear any matter involving the ACMA or the Commonwealth.

6. No variation

- 6.1 The Promisor acknowledges and agrees that there can be no variation of this Deed.

7. No assignment

- 7.1 Neither the ACMA nor the Commonwealth may assign its rights under this Deed.

8. Definitions and interpretation

- 8.1 In this Deed:

Allocation Determination means the *Radiocommunications (Spectrum Licence Allocation – 3.6 GHz Band) Determination 2018*.

Amount means the dollar amount specified in clause 1.1.

auction means the auction of spectrum lots held in accordance with the Allocation Determination.

Deed means this document, including any schedule or annexure to it.

deed of acknowledgment means the deed of acknowledgment in the form approved by the ACMA under paragraph 27(1)(g) of the Allocation Determination and executed by the Applicant.

Promisor means the person making this Deed.

Executed as a deed

Where the Deed is executed by a body corporate:

For and on behalf of:

Name of Promisor

ACN or ARBN

by authority of the directors:

Name of director

Signature of director

Name of director/secretary

Signature of director/secretary

OR

Executed as a deed

Where the Deed is executed by a person acting under a power of attorney for a body corporate:

Signed, sealed and delivered for and on behalf of:

Name of Promisor

ACN or ARBN

by:

Name of Attorney

Signature of Attorney

who is duly authorised by power of attorney

Insert number or date or other means of document identification

in the presence of

Name of witness

Signature of witness

Note If the Deed is executed by a person acting under a power of attorney for a body corporate, the Applicant must give the ACMA a copy of the power of attorney with the Deed; and the execution of the Deed must be witnessed by a person who is above the age of 18