

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to  
ACMA Consultation

**Proposed affirmation  
about collusion for the  
3.4/3.7 GHz bands auction**

Public Version

May 2023

## RESPONSE TO CONSULTATION

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1. Optus welcomes the opportunity to provide feedback on the Australian Communications and Media Authority's (ACMA) consultation the "*Proposed affirmation about collusion for the 3.4/3.7 GHz bands auction*" (the Consultation).
2. In the ACMA's recent consultation on the draft allocation and technical instruments for the 3.4/3.7 GHz bands auction, the ACMA indicated that it intends to "seek a statement from each applicant that the applicant has not colluded with another party in relation to the 3.4/3.7 GHz auction".<sup>1</sup> The ACMA is now seeking feedback on the proposed wording of a draft "Collusion and Anti-Competitive Conduct" clause that it would require applicants to affirm as well as its preference to insert this clause in the deed of acknowledgment required from all applicants by the deadline to apply to participate in the auction.
3. The ACMA's stated intention is to "strengthen the integrity of the auction process and safeguard the auction against collusive behaviour, such as coordination of bidding strategies ahead of the auction, which may impact the auction outcome".<sup>2</sup> It does this by seeking affirmation about conduct in the lead-up to the allocation process being advertised. In this way it is intended to supplement the existing confidentiality obligations under the draft *Radiocommunications (Spectrum Licence Allocation – 3.4/3.7 GHz Bands) Determination 2023* (the draft allocation determination) and the deed of confidentiality that take effect from the date the deed is executed by an applicant, typically the application deadline, until the ACMA publishes the auction results.
4. Optus supports the proposal and agrees that the deed of acknowledgment appears to be the most suitable location for seeking the affirmation from applicants. Optus has concerns about aspects of the drafting which we set out in further detail below.

### **The proposed affirmation does not address all competition related concerns**

5. While Optus welcomes the proposed affirmation, we do not consider that it addresses our main concerns about the potential for the 3.4/3.7 GHz auction to undermine competition. These concerns relate to the ACMA's proposed approach to affiliations and the related impact on allocation limits that were detailed in our March 2023 submission to the ACMA's recent consultation on the draft allocation and technical instruments as well as previous Optus submissions.
6. Optus is concerned that the ACMA intends to only "deem agreements between parties about the spectrum available for bidding at auction to cause the parties to the agreement to be affiliated".<sup>3</sup> Equally concerning for Optus is the ACMA's statement that it proposes to "only include the spectrum-licensed holdings for which the bidder is the licensee in assessing the application of the allocation limits to the bidder."<sup>4</sup>
7. Optus interprets these statements to mean that the ACMA will not have regard to existing agreements between Telstra and TPG about Telstra's use of TPG's 3.6 GHz spectrum, including in metro markets and under the proposed MOCN arrangements, in determining whether Telstra and TPG are affiliated for the purposes of the 3.4/3.7 GHz auction. Optus submits that if Telstra's access to TPG's 3.6 GHz spectrum is not relevant to assessing the application of allocation limits, then the auction will afford

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<sup>1</sup> Draft allocation and technical instruments for the 3.4/3.7 GHz bands auction; Consultation paper; Feb 2023 p.65

<sup>2</sup> [Proposed affirmation about collusion for the 3.4/3.7 GHz bands auction | ACMA](#)

<sup>3</sup> ACMA Feb 2023 Consultation paper, p.65

<sup>4</sup> Ibid, p.58

Telstra an opportunity to entrench its dominance in mid-band spectrum holdings, particularly in regional areas.

8. Optus considers that such outcomes are inconsistent with the policy objectives of the Ministerial Policy Statement to which the ACMA is to have regard when making decisions concerning the re-allocation of 3.4/3.7 GHz spectrum.<sup>5</sup> Optus also notes that the ACMA's approach appears hard to reconcile with the ACMA's stated view that 3.4 to 3.8 GHz spectrum is substitutable.<sup>6</sup>
9. Optus understands that the ACMA may have regard to application forms, statutory declarations and statements from applicants and "any other information that it considers relevant" to determining affiliations and will make such determination closer to the auction date.<sup>7</sup> Optus submits that the ACMA should have regard to existing agreements between Telstra and TPG for use of TPG's 3.6 GHz spectrum as "relevant agreements" for the purposes of determining whether they are "associates" and therefore "affiliated" applicants/bidders for the 3.4 GHz and 3.7 GHz auction.
10. Further, given the substitutability of 3.4 GHz to 3.8 GHz spectrum, Optus considers that the quantum of spectrum accessible by Telstra via such agreements with TPG should be relevant to the ACMA's assessment of the application of the allocation limits. Should the MOCN arrangements relating to 3.6 GHz be in effect at the time the ACMA determines final allocation limits, then Optus reiterates its request that the ACMA impose allocation limits of 140 MHz in metro and 100 MHz in regional areas as the best means of avoiding the anti-competitive effects of Telstra entrenching dominance in regional mid-band spectrum holdings among MNOs.

#### **Comments on drafting of proposed "Collusion and Anti-Competitive Conduct" clause**

11. The deed of acknowledgement affirms the statutory obligations imposed upon an applicant in respect of their participation in the allocation process under the allocation determination and requires an Applicant to agree to be bound by the allocation determination. Optus agrees with the ACMA that simply including the additional wording in the deed of acknowledgement is a more efficient and simpler option than requiring applicants to sign a further/separate statement (i.e., in addition to the deed).
12. Optus also agrees that the "Collusion and Anti-Competitive Conduct" clause will strengthen the existing confidentiality obligations relating to the allocation of spectrum licences in 3.4/3.7 GHz band. It will do so by requiring an applicant to expressly warrant that they have not "engaged in conduct that would, or might reasonably be construed to, contravene any provision of Division 1 of Part IV of the *Competition and Consumer Act 2010*" (offences and penalties relating to cartel conduct) relating to the allocation.
13. To this end, Optus supports draft clause 1.1. In particular, Optus welcomes the proposed extension of the scope of the conduct captured by the clause to that which "might reasonably be construed to" contravene any provision of Division 1 of Part IV of the CCA, as an effective means of promoting the integrity of the auction. However, Optus notes that the scope of "associates" to be captured by the clause should be clearly defined to promote certainty. Optus assumes that "associates" refers to the term as

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<sup>5</sup> Radiocommunications (Ministerial Policy Statement – 3.4-4.0 GHz) Instrument 2022

<sup>6</sup> ACMA Feb 2023 consultation, p.57 and 71

<sup>7</sup> Section 17 and section 43 of the draft Radiocommunications (Spectrum Licence Allocation—3.4/3.7 GHz Bands) Determination 2023

defined under section 15 of the draft allocation determination and would welcome confirmation in this regard.

14. In relation to draft clause 1.2, Optus suggests that the ACMA adopt a two (2) business days/working days timeframe rather than the proposed 48 hours within which to provide the ACMA with written notification of any actual or suspected contravention of clause 1.1. This will avoid any unintended consequences of capturing weekends or public holidays within the notification timeframe.
15. Optus notes that the notification obligation isn't just triggered by an actual contravention, but also by a "*suspected contravention*". Optus understands that the likely intention of this wording may be to promote prompt disclosure of conduct that may raise the prospect of contravening clause 1.1, such as where an investigation may have been initiated and compliance issue identified but not yet concluded upon. While Optus supports such an objective, we would welcome clearer language to improve certainty as to when the notification obligation is actually triggered in cases of a "suspected contravention" of clause 1.1.
16. In relation to draft clause 1.3, Optus considers that the proposed drafting provides the ACMA with a power to disclose confidential information that is unnecessarily broad. While Optus understands that the ACMA has existing powers to disclose confidential information, Optus suggests that disclosure for the purposes of confidential information relating to this clause should be limited to the ACCC, given that the ACCC is the regulator responsible for the enforcement of Division 1 of Part IV of the Competition and Consumer Act 2010. Optus suggests that the drafting of the clause could be simplified to  

*"The Applicant acknowledges and agrees that the ACMA may give documents or information to the Australian Competition and Consumer Commission, including confidential documents and confidential information, where that information may be relevant to any actual or suspected contraventions described in 1.1. This clause does not limit or affect the exercise of any function or power the ACMA has to disclose documents or information to any person."*
17. Optus also requests that wording requiring the ACMA to provide notice to the relevant applicant that such information has been disclosed to the ACCC should be included in clause 1.3.