

Public submission

24 May 2023

Manager
Major Spectrum Allocations Section
Australian Communications and Media Authority

By email: spectrumallocations@acma.gov.au

Dear Sir/Madam,

RE: ACMA Consultation: Proposed affirmation about collusion for the 3.4/3.7 GHz bands auction

Thank you for the opportunity to comment on the ACMA's proposal to include additional wording regarding collusion and anti-competitive conduct in the deed of acknowledgement to be provided as part of any application to participate in the upcoming 3.4/3.7 GHz bands spectrum auction.

TPG Telecom acknowledges the ACMA's desire to strengthen the integrity of the auction process and safeguard the auction against collusive behaviour and is supportive itself of a resilient auction process that contains safeguards against collusion. However, we are concerned the ACMA has not provided a sufficient basis or reasoning to support the need for additional measures, which seem intended to provide the ACMA with some level of ability to carry out a quasi-enforcement role in relation to competition law matters. We also have concerns with the language proposed by the ACMA, which potentially interferes with established ACCC policy and is overly broad.

Competition law considerations have applied to each and every past spectrum auction and will apply to the upcoming auction, regardless of whether an affirmation is provided by auction participants at the ACMA's request.

A statement regarding collusive bidding is expressly included in the ACMA's auction guides. For instance, the *850/900 MHz band auction, November/December 2021 Auction guide* (September 2021) includes the following (page 3):

Collusive bidding

Applicants and their officers, employees, agents and advisers must not engage in any collusive bidding, anti-competitive conduct or any other similar conduct with any other registered applicants or any other person in breach of applicable laws (including but not limited to the Competition and Consumer Act) when preparing or lodging applications or bidding instructions for a spectrum licence under the allocation process. Applicants must comply with the requirements of the allocation determination concerning affiliations.

Similar statements were also included in the auction guides for previous spectrum auctions. TPG Telecom is supportive of the ACMA including statements in its auction guides and other materials, which are intended to bring attention to and raise awareness among auction participants of their obligations to avoid collusive bidding and anti-competitive conduct, along with the serious consequences of any contravention of the law.

Proposed wording raises unacceptable legal and commercial risks

However, TPG Telecom has strong concerns about the additional wording the ACMA has included in its proposed affirmation, which could introduce an unacceptable level of legal and commercial risk to auction participants.

Our first main concern is with the obligation to notify the ACMA in writing of any actual or suspected contravention within 48 hours. This obligation could interfere with an applicant's ability to seek immunity in respect of cartel conduct under the *ACCC Immunity and Cooperation Policy for Cartel Conduct* (October 2019) (**ACCC Immunity Policy**).

The ACCC's Immunity Policy contains strict confidentiality obligations. A condition of eligibility for conditional-immunity from ACCC-initiated civil proceedings is "*the corporation has maintained, and agrees to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.*"

A potential perverse outcome of the ACMA's proposal is an applicant suspects cartel conduct and seeks immunity from the ACCC. At the same time, the clock has started to run on the 48-hour window within which the applicant is required to notify the ACMA. If the applicant does not obtain consent from the ACCC within time, or the ACCC refuses consent, the consequence is the applicant will be in breach of the ACMA deed. However, if the applicant proceeds to notify the ACMA, consistent with their obligations under the deed, then they could be jeopardising their application for immunity.

Our second main concern is the breadth of the words "*might reasonably be construed*", which we consider introduces a vague and imprecise threshold. It is unclear to TPG Telecom whether this threshold is based on any objective or legal standard, which in turns makes it difficult (if at all possible) for auction participants to ensure compliance with the affirmation, let alone to assess compliance in a consistent manner. The meaning of "*might*" in this context is unclear and could be interpreted in many varied ways. For instance, this could be interpreted to mean more than a 50% chance, more than likely, a real chance, or something less than probable but more than remote.

The proposed wording does not adopt the language of the legislation to which it refers, creating further uncertainty regarding the obligations. Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) does not use the words "*might reasonably be construed*" or any similar concept in any provision.

The proposed wording also goes beyond the scope of the statement expressed in the ACMA's *Consultation Paper: Draft allocation and technical instruments for the 3.4/3.7 GHz bands auction*

(February 2023), which contemplated a statement only in relation to actual breaches,¹ whereas the proposed wording also refers to “suspected” contraventions.

Given the above, we strongly urge the ACMA to reconsider its proposal. We welcome any further discussion regarding the concerns raised in this letter. Please feel free to contact Stephanie Phan, Acting Head of Industry Strategy TPG Telecom, at stephanie.phan@tpgtelecom.com.au.

Yours sincerely,



Trent Czinner
Group Executive Legal & External Affairs
TPG Telecom Limited

¹ ACMA, *Consultation Paper: Draft allocation and technical instruments for the 3.4/3.7 GHz bands auction* (February 2023): “In order to maintain the integrity of the auction process, we intend 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 bands auction.” (page 65, emphasis added).