

Licence to use ACA Auction Software in Australia

PERMISSION TO USE ACA AUCTION SOFTWARE IS CONDITIONAL UPON THE USER AGREEING TO THE TERMS AND CONDITIONS SET OUT BELOW. USERS AGREE TO THESE TERMS BY SIGNING THE DEED OF ACKNOWLEDGMENT.

AUSTRALIAN COMMUNICATIONS AUTHORITY a body corporate established under the *Australian Communications Authority Act 1997* ('ACA') grants to the User a licence to use the Software on the following terms and conditions:

Interpretation

1.1 In this Licence, the following terms have the following meanings, unless the contrary intention appears:

“Act” means the *Radiocommunications Act 1992*.

“associate” means an associate as defined in the Minister’s Direction under section 60(10) of the Act.

“Associated Documentation” means the manuals, information and aids (whether in writing or in any other form) provided to the User by the ACA to assist the User in the use of the Software and any information created during the auction and used on the software.

“auction” means an auction held by the ACA under the Determination.

“Confidential Information” means information that:

- (a) is by its nature confidential;
- (b) is designated by the ACA as confidential; or
- (c) the User knows or ought to know is confidential;

and includes:-

- (d) information comprised in or relating to any Intellectual Property Rights of the ACA;

and does not include information which:

- (e) is or becomes public knowledge other than by breach of this Licence or other unlawful act by the User;
- (f) has been independently developed or obtained from another source by the User;

(g) is in the possession of the User without restriction in relation to disclosure before the date of receipt of the information and the Software from the ACA.

“Determination” means the determination made by the ACA under section 60(1) of the Act.

“Intellectual Property Rights” includes copyright, trade mark, design, patent, semiconductor or circuit board layout rights, trade, business or company names, confidential or other proprietary rights, know how, or any rights to registration of such rights, whether created before or after the date of this Licence and whether created in Australia or elsewhere.

“Licence” means this licence granted by the ACA to the User on the terms and conditions and for the purpose set out below.

“Software” means the software prepared by the ACA for the purposes of the conduct of auctions of spectrum licences in accordance with the Determination.

“Third Party Rights” means the Intellectual Property Rights embodied in the Software which are owned by a person other than the Commonwealth of Australia, and which are embodied in the Software under a licence.

“User” means the Applicant licensed to use the software under this Licence by virtue of having signed the Deed of Acknowledgment.

Scope of Licence

2.1 The ACA grants to the User a non-transferable and non-exclusive licence to use the Software in Australia for the purpose of participation in an auction under the Determination, in accordance with the terms and conditions of this Licence.

2.2 This Licence entitles the User to:

(a) install, use and store the Software on any processor owned or under the exclusive control of the User for the sole purpose of enabling the User to participate in Australia in an auction under the Determination;

(b) copy the Software to make sufficient copies to provide backup and security to support the User’s use of the Software for the sole purpose of participating in Australia in an auction under the Determination and in accordance with this Licence and the provisions of the *Copyright Act 1968*.

2.3 This Licence applies to Associated Documentation. The Associated Documentation may not be copied, modified or used in any way not contemplated or expressly authorised by this Licence.

2.4 Intellectual Property Rights in the Software and Associated Documentation (other than Third Party Rights) are vested in the ACA. All rights in the Software are reserved and the User may not exercise any rights in the Software (including any

Third Party Rights) for any purpose outside the scope of this Licence, and other than as expressly provided in this Licence.

Duration of the Licence

3.1 This Licence commences on the date of execution of the Deed of Acknowledgment by the User and will continue until the completion of the auction under the Determination unless terminated sooner in accordance with the terms of this Licence.

Delivery and Installation

4.1 The ACA is not responsible for any aspect of the installation of the Software. All risks, including of loss or damage, associated with the installation and operation of the Software, pass to the User upon delivery to the User.

Restrictions on Use

5.1 The User shall not copy, reproduce, adapt, alter, modify, create derivative works, reverse engineer or de-compile, or exploit the Software (including Third Party Rights) or the Associated Documentation except as provided for in section 2.2 or under the *Copyright Act 1968* or otherwise with the ACA's specific prior written consent.

5.2 Only the User, its employees, contractors and agents, engaged in the business of the User or to provide support to the use of the Software by the User for the purposes of participation in an auction conducted by the ACA, may use the Software and the Associated Documentation under this Licence.

5.3 The User shall not without the ACA's prior consent in writing, sell, rent, lease, sub-licence, lend, time share or transfer in whole or in part, or provide or otherwise make available the Software to third parties in any form.

Security

6.1 The User will be responsible for the use, supervision, management and control of the Software and Associated Documentation.

6.2 The User will ensure that the Software is protected at all times from access, use, reproduction, misuse, damage or destruction by any person not authorised for that purpose.

6.3 The User shall ensure that all copies of the Software and Associated Documentation made or used by the User bear notice of the ACA's ownership of copyright and a notice stipulating the Software and Associated Documentation contains information confidential to the ACA. The User shall comply with any requirements of the ACA as to the form, placement or content of such notices.

6.4 If requested by the ACA, the User shall issue a notice in a form approved by the ACA to all employees and other authorised users of the Software under its

direction or control, advising such persons of the User obligations under this Licence and also advising of the possible civil and criminal consequences of a breach of this clause.

6.5 The User shall not, without the ACA's prior consent in writing, copy, provide, disclose or cause to be copied or disclosed any Confidential Information concerning the Software to a third party.

6.6 The User's obligations under this clause shall survive the termination of this Licence.

6.7 The User agrees to return all copies of the Software and Associated Documentation to the ACA within 14 days of completion of the auction.

Warranties

7.1 This Licence excludes all conditions, warranties and terms implied by custom, general law or statute, except ones that by law may not be excluded.

7.2 The ACA makes no warranties as to the Software except warranties provided by law that cannot be excluded. Without limiting the above, the ACA expressly does not warrant that:

7.2.1 the Software is error free, defect free, or virus free;

7.2.2 the use of the Software will be uninterrupted;

7.2.3 the Software is fit for a particular purpose.

7.3 Without limiting the above, the ACA shall not be liable to correct any defect in the Software.

7.4 Nothing in this Licence, and no actions taken by the ACA from time to time in the nature of assistance to the User, shall oblige the ACA to support the Software, whether by providing advice, training, error-correction, modifications, upgrades, enhancements or otherwise.

Liability of ACA

8.1 Except as provided by laws that cannot be excluded, the ACA shall not be under any liability to the User in respect of any loss or damage (including consequential loss or damage) however caused, which may be suffered or incurred or which may arise directly or indirectly in respect of the supply of goods or services pursuant to this Licence, or the failure or omission on the part of the ACA to comply with its obligations under this Licence.

8.2 Except as expressly provided to the contrary in this Licence, all warranties whether express, implied, statutory or otherwise relating in any way to the subject matter of this Licence or to this Licence generally, are excluded. Where any Act of Parliament or other statutory law implies in this Licence any term, and that Act or statutory law avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such term, such term shall be deemed to

be included in this Licence. However the liability of the ACA for any breach of such term shall if permitted by that Act be limited, at the option of the ACA, to the replacement of defective goods.

8.5 The ACA will not be liable for any indirect or consequential damages arising out of a breach of this Licence or arising out of the supply of a defective program.

8.6 The User warrants that it shall conduct such tests and virus scanning as may be necessary, prior to use of the Software, to ensure the Software (and the media in which it is delivered to the User) does not contain any virus and that the use of the Software will not in any way corrupt the User's data or systems or those of any other person.

Termination

9.1 Without limiting the generality of any other clause in this Licence, the ACA may terminate this Licence immediately by notice in writing if:

9.1.1 the User breaches any clause of this Licence and such breach is not remedied within seven (7) days of written notice by the ACA;

9.1.2 the User transfers or purports to transfer the Licence;

9.1.3 the ACA or the auction manager decide to suspend or cancel the auction under the Determination.

9.2 If notice is given to the User pursuant to clauses 9.1, the ACA may, in addition to terminating the Licence and pursuing any additional or alternative remedies provided by law repossess any copies of the Software and Associated Documentation in the possession, custody or control of the User and be regarded as discharged from any further obligations under this Licence.

9.3 Upon termination the User or its representatives shall immediately return the Software and the Associated Documentation or dispose of such material in the manner directed by the ACA and furnish the ACA written notification advising the ACA of what action has been taken under this clause.

Assignment

10.1 The benefit of this Licence shall not be dealt with in any way by the User (whether by assignment, sub-licensing or otherwise) without the prior written consent of the ACA.

10.2 This Licence shall enure to the benefit of and be binding upon any successor body of the ACA including any body with which the ACA is merged, or any body which carries out regulatory functions similar to the functions presently carried out by the ACA under the Act, and the User hereby consents to the assignment of the benefits or the novation of this Licence to any such body.

10.3 The obligations imposed by this Licence on the User shall be binding upon the successors, trustees, permitted assigns or receivers of the User.

Waiver

11.1 No right under this Licence shall be deemed to be waived except by notice in writing signed by each party. A waiver by the ACA pursuant to this clause will not prejudice its rights in respect of any subsequent breach of this Licence by the User.

11.2 Subject to clause 11.1, any failure by the ACA to enforce any clause of this Licence, or any forbearance, delay or indulgence granted by the ACA to the User, will not be construed as a waiver of the ACA's rights under this Licence.

General

12.1 The covenants, conditions and provisions of this Licence which are capable of having effect after the expiration of the Licence shall remain in full force and effect following the expiration of the Licence.

12.2 The User shall sign all documents and do all things necessary or desirable to give effect to this Licence and will procure its officers, employees, contractors, associates and agents to declare, make or sign any documents, and do all things necessary or desirable to give full effect to this Licence.

12.3 If any provision of this Licence is held invalid, unenforceable or illegal for any reason, this Licence shall remain otherwise in full force apart from such provision which shall be deemed deleted.

12.4 This Licence will be governed by and construed according to the laws of the Australian Capital Territory.