

Department of Transport and Communications

Guidelines for Price-Based Allocation Processes

(Revised 20 October 1993)

Note: The draft of 30 September has been revised in the light of commercial comment and views provided by the ANAO. (The ANAO's comments do not imply ANAO endorsement). Further revision may be required in the light of comment from other Commonwealth agencies and completion of current licence allocation exercises in the portfolio.

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1: INTRODUCTION

- 1.1 In May 1993, following its first efficiency audit of the sale of a Commonwealth business enterprise, the Australian National Audit Office (ANAO) published a "best practice guide" to assist Commonwealth agencies through the main steps involved in such sales. This followed the Department of Transport and Communications' management of the sale of AUSSAT as part of the process of licensing Optus as Australia's second telecommunications carrier.
- 1.2 The Department of Transport and Communications has been required in recent years to use price-based or similar processes to allocate "rights" or licences in the communications sector. These have included the right for certain metropolitan commercial radio stations to convert from AM frequencies to FM; licences to operate radiocommunications transmitters in the "MDS" bands; the right to Australia's third public mobile telecommunications licence, and the right to satellite Pay TV licences.
- 1.3 The Broadcasting Services Act 1992 provides for the use of a price-based system for the allocation of all future commercial radio and television broadcasting licences (s.36), as well as providing for satellite subscription television broadcasting licences A and B to be awarded using a price-based system (s.93). The Radiocommunications Act 1992 provides for specified transmitter licences to be allocated by using a price-based system (s.106) as well as providing that all spectrum licences for unencumbered spectrum shall be allocated by auction, tender, or by fixed or negotiated price (s.60). The Telecommunications Act 1991 provides for AUSTEL to manage the numbering of telecommunications services in Australia (s.39) and to allocate numbers on application (s.242). This is likely to involve the use in future of price-based allocation systems for "premium" numbers.
- 1.4 Price-based processes can be an objective and efficient means for allocating scarce or limited resources among competing applicants or competing uses. They create economic incentives in a commercial environment for the resources to be deployed to the most efficient uses and to be used most efficiently in those applications. They allow for the "economic rent" associated with the award and use of the right or licence to be paid to (or at least shared with) the community through the allocation price paid, rather than being wholly a windfall gain to the licensee.

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- 1.5 In his letter of 25 May 1993 to the Minister for Transport and Communications, and again in his submission of 6 August 1993 to the *Senate Select Committee on Matters Arising from Pay Television Tendering Processes*, the Secretary to the Department of Transport and Communications foreshadowed the preparation of Departmental guidelines for future price-based allocation processes.
- 1.6 These guidelines draw on the experience of the Department of Transport and Communications in conducting the allocation processes for telecommunications licences in 1990-92, and for the Satellite Subscription Broadcasting Service Licences and Multipoint Distribution System transmitter licences in 1993. They are intended to supplement the ANAO "best practice" guide particularly in the circumstances of price-based allocation of communications rights or licences.
- 1.7 The purpose of the guidelines is to assist future processes to achieve efficient and effective outcomes that are consistent with Government policy requirements and that can sustain appropriate public, Parliamentary and other valid scrutiny - including the possibility of legal challenge. The guidelines need to be applied and adapted to the specific allocation process in hand, having regard to the characteristics of what is to be allocated, the particular legislation, regulatory arrangements, market conditions and other factors. That will often require consideration beyond the scope of this general document.
- 1.8 The guidelines address the four stages identified by the ANAO guide - extended as appropriate;
 - (a) identification;
 - (b) planning;
 - (c) implementation; and
 - (d) review.
- 1.9 These guidelines depart to some extent from the ANAO structure in suggesting that rather more of the detail be finalised at the 'planning' stage, so that implementation can be expedited. In an allocation exercise, unlike a privatisation, information preparation and legal documentation can largely be finalised at the planning stage.

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- 1.10 Attention is also drawn to the publication "Accountability in the Commonwealth Public Sector", MAB/MIAC publication No.11, AGPS, June 1993. This booklet provided a framework of accountability principles and practices in the context of the central importance of the rule of law in the conduct of public affairs, especially the need for probity and fairness at all stages.

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2: IDENTIFICATION

2.1 The main purpose of the identification stage is at a policy or strategic level to:

- (a) establish clearly what it is that is to be allocated by the process (eg a particular licence; one of a number of similar licences);
- (b) establish the specific objectives for the process, (for example, the balance between revenue maximisation and maximum licence allocation; any subject-specific policy aims - such as encouragement of new services, technologies or the like; and other public policy objectives - such as community service obligations);
- (c) define the roles and responsibilities of the various Commonwealth entities involved; and
- (d) define the expected need for, and roles of external advisers in areas such as technology assessment, valuation, commercial, administrative and contract law, and commercial practice, and the criteria for their selection.

2.2 The detailed definition of the subject of the allocation process is addressed further in para 3.8 et seq.

2.3 The objectives that are identified should focus primarily on the timely and efficient achievement of the specific objectives that the Government has established for the particular allocation process. This will usually include arranging for the licence to be operable in the market as soon as possible. However, they should also explicitly include other general process, public interest and accountability objectives, including:

- (a) protection of the Commonwealth's financial and other interests;
- (b) compliance with Commonwealth obligations in respect of privacy, security and the like;
- (c) the cost-effective and publicly defensible use of Commonwealth financial and other resources;
- (d) demonstrated probity and ethical conduct;
- (e) avoidance of undue risk of litigation; and

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(f) transparent and equitable processes and decision making that are defensible to the Parliament and public as well as at law.

- 2.4 At this stage, consideration should be given to the consistency between the objectives and the proposed use of a price-based process. The need for possible pre-qualification requirements and/or licence conditions to augment the price-based process may need to be considered. Some allocation processes may need to have multiple selection criteria, rather than being solely price-based, where there are explicit public policy objectives that cannot be addressed by the use of price as the sole selection criterion, consideration will need to be given to the alternative of using multiple selection criteria, provided that is consistent with legislative provisions.
- 2.5 An early matter to be settled is the identification of the agency to have executive responsibility for the conduct of the process. In many cases this will be implicit in the legislation, while in others it may be necessary to consider using another agency, including the Asset Sales Task force in the Department of Finance.
- 2.6 An early decision is also needed on the level at which responsibility for the process and its outcomes will rest on the allocation of responsibilities to officer and teams. In a process that is solely price-based, the final allocation decision will usually be an objective administrative conclusion rather than a decision. As such, Ministerial involvement may be able to be limited to approval of the process and announcement of the outcome. (This is unlike non-price-based, or multi-criteria, allocations where decisions on trade-offs among the criteria may need to be made at Ministerial level, unless legislation provides for a statutory agency to undertake that role.)
- 2.7 Where the possible revenue effects of the allocation may be significant in a Budget context, the responsible Minister would need to keep the Minister for Finance advised. Where the allocation process involves wider industry issues - in particular any industry development conditions, then there may need to be consultation with the Minister for Industry, Technology and Regional Development.

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- 2.8 Other Government agencies may be affected. In the case of communications rights, these could include Defence (in respect of their use of facilities and spectrum); law enforcement and security agencies (in respect of national security and/or interception matters); Health, Housing and Community Services in respect of some safety-of-life services and electromagnetic interference effects; Treasury and the Trade Practices Commission in respect of any competition policy and enforcement issues. A wide net should be cast to ensure all relevant Commonwealth interests are identified in good time.

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3: PLANNING

3.1 The planning stage will involve both the responsible management team and appropriate advisers. It has five main elements:

- (a) management planning;
- (b) definition of the "right" or licence to be allocated;
- (c) assessment of the likely market;
- (d) design of the allocation process; and
- (e) preparation of detailed information for potential applicants.

Management Planning

3.2 The pressures when an allocation process is in train may sometimes be inimical to consistently clear and controlled decision making. A detailed, well documented plan of action assists in managing these pressures.

3.3 The planning stage is concerned with the detailed planning of the process. A detailed management plan, consistent with the approved strategy, should be developed for endorsement by senior management or Government. An activity diagram, flow chart and/or critical path diagram is a useful management tool. The plan should identify the principal risks and contingencies and how they will be managed.

3.4 The plan should identify financial and staffing resource needs to ensure that the process can be completed in the planned timescale.

3.5 A management structure needs to be put in place with associated lines of authority and accountability that are clearly set out and authorised. Where the process is routine and will follow well-documented procedures it may be sufficient to execute it as a line management function. In cases where the process is new, complex, or particularly sensitive it may be preferable to establish a special project team managed through a steering committee. The use of external advisers must be planned and integrated into the management structure.

3.6 Where the plan calls for Government or Cabinet consideration or legislative action, that needs to be scheduled carefully having regard to the requirements of Cabinet business forecasts and the Parliamentary timetable.

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- 3.7 Once developed, the plan provides an early indication of areas requiring further attention. The initial plan should be developed prior to any public involvement in the process such as seeking expressions of interest. It should be reviewed and updated as the process proceeds to accommodate new information and new developments.

Definition

- 3.8 The "rights" or licence(s) to be allocated must be defined as precisely as possible in order to minimise uncertainty. The output of the "definition" stage must be robust, correct, complete and unambiguous. It may be advisable to obtain external independent technical and commercial advice as part of a quality assurance process in this respect.

Legal Context

- 3.9 Any price based allocation process must be completely consistent with the scheme of the applicable legislation, including associated licensing and regulatory arrangements. In most cases there will be a primary Act governing the process (see para 1.3 above). In addition there may be extant subordinate legislation in place, or there may be a need to make or amend such legislation - notably Determinations under the primary Act.
- 3.10 All processes must be conducted having regard to the provisions of Administrative Law, specific case law, and applicable principles of common law. The Audit Act and Finance Regulations will also apply, especially in settling arrangements for the handling of money by the Commonwealth.
- 3.11 Any need for specific enabling or amending legislation should be identified at an early stage. Some aspects of the process - such as any payment of interest on deposits held by the Commonwealth - may need explicit appropriation by the Parliament.
- 3.12 In some cases it will be necessary to refer to generally applicable commercial law - in particular the Trade Practices Act 1974 and the Foreign Acquisitions and Takeovers Act 1975.
- 3.13 Specialist legal advice, including from the Office of Commercial Law in the Attorney-General's Department, will usually be required. Any statutory instruments required should be prepared by qualified legal personnel - preferably the Office of Legislative Drafting - from explicit instructions.

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Licensees' rights, obligations and limitations

- 3.14 All of the rights, obligations and limitations of licensees, and how they are authorised or imposed, need to be defined in detail prior to conducting the allocation process.
- 3.15 Where it is not possible to settle these matters substantively, the relevant legislative provisions, current policy, and expected processes should be set out, in order to minimise uncertainty. Additional formal regulatory instruments (standards, guidelines and the like) may be needed.
- 3.16 Without limiting the generality of this requirement, this stage must identify and address:
- (a) the precise rights conveyed by the licence to be allocated;
 - (b) licence duration and arrangements for renewal/re-allocation;
 - (c) licence fee arrangements (including future revisions to fee scales);
 - (d) any applicable technical specifications, conditions and standards;
 - (e) geographic location;
 - (f) any related licensing issues (such as the need for some uses of Radiocommunications Act licenses to be licensed as services under the Broadcasting Services Act or the Telecommunications Act and to pay associated fees); and
 - (g) any ancillary obligations or conditions (ownership restrictions; usage restrictions, industry development obligations; timing constraints on service commencement and the like).
- 3.17 One issue in this context will be the rights of licensees to transfer or sell their licences or rights to third parties. Associated with this would be the possible right of licensees to authorise third parties to exercise their licence rights - or fulfil their licence obligations.
- 3.18 The concept of price-based allocation and market efficiency is broadly consistent with licensees having such rights and, with the role of a secondary market in licence rights - although the involvement of arbitrageurs in the initial allocation of licence rights may attract some public criticism in particular cases.

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- 3.19 Consideration will need to be given to how rights and obligations associated with a licence are to be maintained effectively through any change of ownership. Appropriate registration arrangements may be needed to keep records of ownership or authorised third party use.

Regulatory framework

- 3.20 The full rights and duties of the Commonwealth or its agencies in respect of the post-allocation period also require to be settled prior to allocation. Mostly this will be addressed by the provisions of legislation or regulation.
- 3.21 Any proposal to provide contractual certainty to licensees regarding the future legislative action of the Commonwealth would need to have specific legislative authority (see for example s.70 of the Telecommunications Act 1991). Ministers cannot fetter the future use of their statutory powers.

Market Assessment

- 3.22 The nature of the market for the acquisition of the particular rights or licences will influence the choice of the allocation method and the design of the process.
- 3.23 It is not usually appropriate for this stage to look at the prospective commercial viability of any particular applicant for the licence or right to be allocated, or to consider the effect of the allocation on any existing licensees, unless there is some over-riding public interest that requires these matters to be addressed. This will usually have been specified in relevant Government policy or in legislation at the outset. In the case of commercial broadcasting licences, for example, the Broadcasting Services Act 1992 leaves questions of commercial viability to the commercial judgement and skills of those involved.

Likely uses

- 3.24 The permitted or likely commercial and community uses for the relevant rights or licences should be identified as far as possible, in order to assist in valuation and design of appropriate processes. Consideration should be given to future uses that might become available or viable through technological change. Current regulatory restrictions on use, and any actual or foreshadowed sunset provisions (such as the ending of the duopoly restrictions on telecommunications carriers in 1997) will be relevant.

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Likely applicants

- 3.25 The nature and extent of the likely commercial interest in obtaining the rights or the licences should be considered. This is to ensure that the process does not favour or exclude any particular class of applicants, while avoiding going to lengths where that would be unnecessary or not cost-effective.
- 3.26 Allocation processes may need to allow for bona fide new participants in a previously established industry sector. Therefore the nature of the allocation process and the information provided in connection with it should not assume familiarity with established administrative practice in any particular sector. At the same time the allocation process should not encourage application by parties who lack necessary skills, experience or resources to take up the opportunities.
- 3.27 Consideration may be given to formally seeking non-binding "expressions of interest" at this stage to assist in gauging the market where there may be inadequate information.

Valuation

- 3.28 Consideration should be given to the likely order of magnitude of value of the licence, insofar as that is practicable, in order to ensure that the costs of the process, and its design, are consistent with the amounts at stake. Independent external financial and commercial advice may need to be sought on possible values.
- 3.29 Any indicative valuations should be held in confidence to the Commonwealth in order to avoid distorting the subsequent process.

Process Design

- 3.30 The design of the allocation process needs to reflect the specific objectives for the particular process, as well as the rights or licence(s) being allocated and the expected nature of the market. The process should be fair and certain in achieving the established objectives and be executed promptly having regard to the circumstances. The process should avoid placing undue pre-application workload or financial burdens on applicants, especially by way of excessive requirements for specialised legal and technical advice.

Pre-qualification

- 3.31 Consideration needs to be given to whether any public interest aspects of the rights to be allocated warrant the field of applicants being limited by qualitative pre-qualification or short listing. Short-listing may also be a valid means of avoiding placing undue pre-application workload burdens on a large number of applicants where few licences are available. The grounds for pre-qualification should relate properly to the objective of the process and be provided for consistent with the provision of legislation. They might include industry experience, financial capacity, business or service plans and the like, but may not address matters that are provided for otherwise in the regulatory framework.
- 3.32 Financial pre-qualification might require intending applicants to demonstrate that they at least have reasonable prospects of firm and timely access to the necessary funds in the event that their application is successful.
- 3.33 Financial pre-qualification should be distinguished from any considerations of viability (see also para 3.23). Viability is usually concerned with whether an applicant's proposed business is likely to be profitable, or with whether the an applicant's proposed business is likely to affect the profitability of other like businesses that were previously established. Wherever possible viability is best left to the commercial judgement and competence of those directly responsible. Only where there is an over-riding public interest in the continuity of some established business, or in the commercial survival of a new business once established, should viability require to be addressed in allocation. (The public interest may include consideration of cost to the Commonwealth).
- 3.34 An alternative to any qualitative pre-qualification can be to impose corresponding requirements or obligations to be performed or carried by the licensee once selected. This can avoid problems associated with any post-allocation changes in the character, plans or ownership of an applicant company that may subsequently invalidate, or render obsolete, the basis of pre-qualification. Such obligations may be imposed by licence conditions, legislation or contract. (However, in some situations it may still be prudent to provide for some prequalification confirmation that applicants would be in a position to meet their continuing obligation).

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- 3.35 In such cases, questions of financial capacity are then usually best handled by way of deposit requirements (see para 3.50 et seq).

Form of pricing process

- 3.36 There are a number of price-based systems that may be appropriate. These include tender, auction, fixed price, and negotiated price. The choice of process will need to be made having regard to the objectives of the process and the market assessment. The responsibility for settling, in principle, the system to be used may be specified in legislation; where it is not, it will usually need to be confirmed at a senior Departmental or Ministerial level. What follows is only an introduction to the alternatives. The specific choice may require more specialised advice and wider consideration.

- 3.37 In an auction choice is usually between:

- (a) an "English" auction, in which ascending bids are called openly, with the right being awarded to the highest bidder. This is generally an efficient process where there are a number of broadly similar rights available and a large number of applicants. It ensures that the rights are allocated to applicants who value them most highly, but at the lowest price they need to pay in order to beat other bidders. The process risks allowing a "windfall" gain to the buyer where that price falls short of the amount that they may have been prepared to pay. It is theoretically superior where different applicants may have quite different valuations of the rights being allocated; and
- (b) a "sealed bid" auction, in which applicants lodge a single sealed bid and the right is awarded to the highest bid. This approach can provide for a higher proportion of the "economic rent" to be tendered in payment. It is more appropriate where there are fewer similar rights or licences available, or where there are relatively few applicants. Where there are no benchmarks available to establish a likely price range in advance of the allocation process, it does run some risk of excessive bids being made, with consequent risk of default or subsequent business failure.

- 3.38 These alternatives are not necessarily exclusive. For example a "sealed bid" auction process could be operated in real time, such that bids for successive licences are informed by the allocation price paid for previously awarded licences. In addition there

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may be scope to design other schemes to suit particular circumstances - although there is merit in basing these closely on known and tried arrangements where possible.

- 3.39 There are other available auction techniques, in particular "Dutch auctions" and "second bid price sealed tenders". These will generally not be appropriate other than in very specialised circumstances.
- 3.40 Where sealed bids are sought, there needs to be an objective means of settling tied bids. One way could be to allocate each bidder a reference number on a random basis so that where offers are equal the bidder with the lower reference number is deemed to be the "winner". Alternatively, the tied bidders could be given an opportunity to lodge further, higher bids.
- 3.41 It may sometimes be open to allocate licences on the basis of a fixed price or a negotiated price. The former may be suitable where there are a large number of licences with a significant and objectively ascertainable value but relatively few applicants. In such cases it may be appropriate to have an independent expert certification that the price is "fair and reasonable".
- 3.42 Care needs to be exercised to maintain demonstrable fairness and probity when engaged in negotiations. Attention is drawn to paras 4.16 - 4.22 of the ANAO's "guide" in this respect.

Multiple Allocations

- 3.43 Where there are a large number of similar licences or rights on offer, then consideration needs to be given to providing scope for applicants who may wish to acquire more than one such licence - perhaps to acquire multiple rights in one location, rights in a number of locations, or even multiple rights in a number of locations. There may be policy or legislative constraints to be observed, as well as allowing for the legitimate interests of potential applicants.
- 3.44 In addressing multiple rights questions, an overriding consideration is to maintain the certainty and integrity of the process. To this end it is desirable to avoid undue complexity. But if the process fails to provide scope for applicants to apply for the particular combinations that they seek, then it may fail to achieve its objectives fully, and will run the risk of applicants defaulting on bids when the outcome only gives them part of what they sought.

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- 3.45 As far as possible without undue complexity and without introducing uncertainty, the process should allow combined applications for specified multiple rights. However, limited experience to date has shown that this is difficult to achieve. An alternative could be to allocate each separate right sequentially to maximise the scope for applicants to progressively build up any "packages" that they seek. While this may yield lower overall returns to Government in some cases (for example where the outcome of initial allocation deters further bidders) it may still be consistent with other process objectives, in particular certainty.

Payment arrangements

- 3.46 It is always preferable for prices offered and accepted to be fixed amounts. Bids that are expressed by reference to the amounts of competing offers should usually be precluded (for example a bid may be expressed as "\$5 million or \$1000 more than any other bid up to a maximum of \$7 million, whichever is the greater" should not be acceptable). Payments made to the Commonwealth need to be cleared funds before they can be treated as "received" rather than merely "tendered".

Deferred Payments

- 3.47 In some cases it may be reasonable to allow prices to include some deferred payments. If deferred payments are to be permitted, this should be made clear, and the basis on which such payments will be assessed should also be established prior to bids being made, in order to maintain objective equity in assessment. Any deferred payments should be due on fixed dates, rather than by reference to some future event. Consideration needs to be given to the means of securing any future payments in terms of amount, timing and certainty of receipt.
- 3.48 To compare competing bids with different payment schedules, discounted cash flow analysis must be employed, so that all bids are compared on the basis of their "expected present values". The discount rates should reflect the risk that the Commonwealth bears in accepting deferred payments and so should reflect the risk profile of the applicant, the market and the cost of finance.
- 3.49 Consideration should be given to requiring guarantees from an applicant's parent companies or shareholders and/or requiring interest payments on deferred payments.

Deposits

- 3.50 The purpose of a deposit is to demonstrate the bona fides of the offer and to provide some tangible insurance against the full balance not being paid when due. A deposit is more likely to be necessary when the process has not involved any financial pre-qualification (see paras 3.31 et seq) or where there is a greater risk of contrived application strategies or default. (In some cases both financial pre-qualification and deposits might be warranted - to ensure that the applicant both can and does pay a bid price.)
- 3.51 Deposits may be payable either on submission of an offer, or on acceptance of an offer. Deposits payable on acceptance of an offer may typically be 10% (for example on the "fall of the hammer" at an "English" auction). Deposits of 5% have been considered appropriate on application.
- 3.52 Deposits tendered with an offer must be refundable if that offer is not accepted. Consideration needs to be given to the payment of interest on any refundable deposits that need to be held for extended periods that are outside the applicants' control. Payment of such interest by the Commonwealth would require funds to be appropriated.
- 3.53 Deposits paid or retained on the acceptance of an offer should generally be non-refundable if the applicant does not then proceed. This serves to discourage frivolous applications and some form of bidding strategies that might be contrived to frustrate the process. However, if there are post-acceptance regulatory hurdles to be satisfied by an applicant, then consideration should be given to allowing for refund in the event that the applicant fails to pass these hurdles for reasons that could not be anticipated and addressed commercially in advance by the applicant.
- 3.54 Recognition also need to be given to the deterrent effects of excessive deposit requirements or lengthy deposit retention periods. The need to risk substantial deposits will deter some potential applicants. It may also tend to reduce the prices offered by some applicants.
- 3.55 There is merit in requiring offers to be binding. Later default then creates an entitlement for the Commonwealth to recover losses. This can be done by requiring offers by companies to be made under seal, or requiring selected licensees to sign an appropriate deed at the time of selection. Allowance needs to be made to avoid unfairly penalising those who may withdraw for bona

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fide reasons beyond their personal or commercial control or capacity. This would not usually include failure of a speculative application.

Multiple applications

- 3.56 It can be valid for one entity to seek multiple rights in an allocation. This is particularly so when there are multiple rights available. The design of the process should address the need for any particular or general limits to be placed on the number or proportion of such rights that might be allocated to any one owner. Such limits would need to be properly authorised in legislation, and procedures for detecting breaches and enforcing compliance would need to be put in place.
- 3.57 In other cases multiple applications, with some intent to use default as a possible commercial strategy, may be part of a contrived or exploitative application strategy that risks thwarting the objectives of the process and jeopardising its timely conclusion. The application and allocation process should be designed to reduce the scope for such applications, minimise the incentive for them to be lodged, and to ensure that they can be dealt with expeditiously if they eventuate. These objectives can be supported by requiring deposits to be lodged with applications or soon after initial allocation.

Reserve Price

- 3.58 If there is an objective basis for doing so, provision should be made to set a confidential reserve price where an auction or tender process is to be followed. If offers received do not exceed the reserve price, then the allocation would not take place in that process. The role of a reserve price in ensuring that the Commonwealth obtains a fair and reasonable price is most useful where there are expected to be relatively few applicants.
- 3.59 A reserve price should only be set where there is the option of not allocating the licence for less than the reserve price.
- 3.60 If offers are made that fall short of the reserve price, then the process should allow for negotiation with those applicants tendering the highest amounts.

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Conformity

- 3.61 Where written offers are to be made, or formal registration is to be required, it is important to specify clearly any requirements of form, process and/or content. There is often merit, especially where simple offers are sought, in adopting a standard application form to avoid uncertainty.
- 3.62 The conformity requirements that are specified as mandatory should be what is needed to verify the authenticity and authority for the application, assess applications properly and to maintain the integrity and certainty of the process.
- 3.63 Applicants should be told about the consequences that will arise from failure to comply with specified requirements. These may include an application not being considered on the grounds of non-conformity. The arrangements should set out any notice and review arrangements associated with findings of non-conformity, as well as addressing how any deposits or fees received in respect of such applications will be managed.

Variation and Termination

- 3.64 It will usually be appropriate to provide explicitly for any arrangements to vary or terminate an allocation process. Such actions may be necessary as a consequence of changes in Government policy, legal action by a third party, the discovery of errors or omissions and so on. (In many cases a change may be limited merely to a change in timetable, venue or to the provision of supplementary information.)
- 3.65 The arrangement should provide for adequate periods of notice to affected parties. Appropriate publicity needs to be provided for, as well as legal certainty.
- 3.66 Decisions to vary or terminate will therefore need to satisfy the tests of legality, fairness, and natural justice. Consideration of the effect on the market will also be appropriate.

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Notices and advertising

- 3.67 Provision is needed for the allocation process to be brought to the attention of all potentially interested parties - including some who may have an interest, but would not themselves be applicants.
- 3.68 Consideration should be given to widespread public advertising, especially in the national press. In some cases international advertising may be appropriate, and there may also be a need to advertise in specialised media or journals.
- 3.69 The formal arrangements establishing the process should make proper provision for adequate advertising, and for any notices that may need to be provided to interested parties. Care is needed to ensure that all advertising complies with any formal requirements laid down in the authorising instruments.
- 3.70 Where the process calls for legal deadlines to be set for receipt of applications, notices or funds, then deadlines should be specified precisely in terms of dates and times. Due allowance needs to be made for the effects of public and bank holidays in each State and Territory. The consequences of any missed deadlines need to be made clear in advance. It will generally be undesirable to provide for deadlines, once set, to be capable of variation. Arrangements should be made for formal certification of receipt within deadlines.
- 3.71 Arrangements may be needed to give legal status to notices delivered by facsimile.

Information Preparation

- 3.72 It is in the Commonwealth's interest to inform potential applicants as fully as possible about the licences or rights, and also about the allocation process. The resultant allocation will best meet its objectives if the market is fully informed.
- 3.73 There is usually a need for some form of information document, catalogue, or prospectus that fully sets out the details of what is being offered for allocation. This needs to address, in particular, the matters canvassed above under "Definition" (paras 3.8 to 3.21). The information provided should be complete, accurate and not misleading. It will usually be appropriate to include a disclaimer of liability, and some encouragement to intending applicants to take their own independent legal, commercial and technical advice, and to rely on their own judgement.

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- 3.74 It is also necessary to prepare and make available documentation that advises intending applicants of the details of the process that is to be followed, including its legal framework. This will need to address the issues covered above under "Process Design" (paras 3.30 to 3.71) and should include any forms that are proposed to be used, and provided authorised contact details.
- 3.75 It may be worth providing potential applicants with the opportunity to comment on proposed documentation before it is finalised. The process must avoid consulting only "established players" in an industry, or to limit access only to well resourced parties with ready access to legal and technical expertise. In acting on comment received from interested parties, care should be taken to avoid giving effect to views that may reflect vested interest rather than public interest. Consultation with industry experts with no vested interests can also be helpful.
- 3.76 The documentation should not be able to be represented as providing legal advice to intending applicants. At the same time, related Commonwealth agencies may need to be alerted to exercise care in discussing matters related to the process with those who may become applicants. For example, during the conduct of the current MDS licence allocation process, all Spectrum Management Agency officers have been advised to refer all MDS-related queries to the Communications Selection Team, even if those officers consider that they could deal with the query themselves.

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4: IMPLEMENTATION

- 4.1 The implementation stage following the planning stage will usually comprise most of the following steps:
- (a) execution of necessary determinations;
 - (b) advertising the allocation process;
 - (c) registration of intending applicants;
 - (d) circulation of information documents;
 - (e) call for applications;
 - (f) receipt and registration of applications;
 - (g) conformity checking of applications;
 - (h) ranking of bids;
 - (i) notification of highest bidders;
 - (j) receipt of payment from successful applicants;
 - (k) issue of licences;
 - (l) re-allocation of licences in the event of default(s);
 - (m) notification of unsuccessful applicants;
 - (n) refund of deposits; and
 - (o) publication of outcomes.
- 4.2 It is useful for the team to develop written operational procedures, especially for handling funds and for contact with applicants - including the handling of registrations, applications and notices. The form of notices requires legal advice.
- 4.3 Each step of the process should be subject to careful checking to ensure that it is consistent with legal requirements and with the intent of the process.
- 4.4 A careful audit trail of documents, notices and processes is required to be maintained.
- 4.5 Many processes will attract public and media attention. In dealing with media and other queries, the validity of public interest will need to be balanced with the Commonwealth's interest in confidentiality at some stages in the process. Applicants may also have bona fide commercial

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interest in confidentiality. Media queries should be anticipated and responses planned. A single point of contact for media queries is desirable. No information should be made available that might advantage any applicant over others.

- 4.6 Once licences or rights have been awarded arrangements are needed to monitor licensees' conduct to ensure that their obligations are met. In many cases this will be a routine regulatory activity that is already provided for in the ongoing functions of the relevant agency. In other cases, special arrangements may need to be made, including for licensees to provide reports, as well as to respond to any market based reports of breaches or non-compliance. As far as possible, such ongoing monitoring should be assigned to a relevant functional unit and embedded in its standard operating practices and instructions, rather than remaining a residual task associated with the allocation process.

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5: REVIEW

- 5.1 Review and evaluation is the last stage of the process. It may often be overlooked in the environment that follows the completion of an allocation. Timely review can help to improve subsequent processes by passing on lessons from each exercise.
- 5.2 It is important to evaluate the process in its entirety. The review should be designed to assist future processes and should analyse the extent to which:
 - (a) the end result met the original objectives;
 - (b) the process was carried out economically, efficiently and effectively; and
 - (c) there were no unintended consequences, and associated implications.
- 5.3 The evaluation should, where practicable, be scheduled within an agency's Portfolio Evaluation Program (PEP) or its Departmental Evaluation Program (DEP). It should be carried out by a team that includes staff who were not engaged in the allocation process, in order to ensure objectivity. The report should be made available to relevant departments and agencies. It should be scheduled as soon as possible after the results of the allocation process are expected to be assessable.