



12 February 2020

Aidan Winder-Speed  
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Dear Aidan

## **Consultation on the Treatment of broadcasting [transmission]<sup>1</sup> services revenue in the Telecommunications Development Levy (TDL)**

### **Introduction**

1. We refer to the Commission's consultation paper of 12 December 2019 entitled "*Treatment of broadcasting services revenue in the Telecommunications Development Levy (TDL)*" (**Consultation Paper**).
2. Terms defined in the glossary to the Consultation Paper are also used in this letter.
3. The impact of the Amendment Act on the TDL regime is not clear, which is understandable given the Amendment Act was not actually intended to make any particular changes to that regime. It is also not clear how the changes to the scope of some of the definition impacts on Sky (if at all) in terms of the TDL regime.
4. For this reason we have set out in some detail our comments on the Consultation Paper and our analysis of the changes to the TDL regime. We have also set out in Attachment A summary responses to the questions raised in the Consultation Paper.

### **TDL – purpose and justification**

5. The TDL was established in 2011 and is collected from certain telecommunication service providers in New Zealand to subsidise specified telecommunication activities which are in the public interest. Section 90 of the Act states that the TDL can be used to fund:
  - (a) TSO charges;
  - (b) non-urban (i.e. rural) telecommunications infrastructure development;
  - (c) upgrades to the emergency service calling system; and
  - (d) facilitating the supply of telecommunication services to groups of end-users to whom those services might not otherwise be supplied.

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<sup>1</sup> For the reasons explained in this submission, we believe that many of the references in the Commission's consultation page to broadcasting services should be to broadcasting *transmission* services (or transmission services for broadcasting). We also think that using the phrase "*broadcasting services revenue*" is confusing and not consistent with the Act (see paragraph 34 of the letter).

6. The TDL was chosen as the funding mechanism for those activities, because those liable for the levy were telecommunication service providers that are the direct beneficiaries of the funded activities.<sup>2</sup>
7. The prescribed uses of the TDL relate to funding critical public telecommunication services and infrastructure related to services like telephone, mobile communications and data transmissions rather than broadcasting. Broadcasting infrastructure has been fully funded by broadcasters without government help. Sky itself has fully funded a nationwide satellite broadcasting service, which provides consistent quality services in every part of New Zealand, both urban and rural. Given this, and the fact that broadcasters do not directly benefit from the TDL, it would be inequitable for broadcasters to contribute to the TDL. This would involve a significant cross-subsidy from one sector to another that has no justification. This result was not intended by the Amendment Act.<sup>3</sup>

### **Analysys Mason report**

8. We refer to the accompanying report produced by Analysys Mason, and note:
  - (a) that the report takes a high level view of broadcasting and over-simplifies the broadcasting technologies used in New Zealand. For example, Sky provides content services via free-to-air, OTT and satellite transmissions. Sky's satellite subscribers access linear and on-demand content via satellite transmissions (through their set-top-box) as well as both linear and on-demand content via OTT using their set-top-box and other devices such as phone, laptops, tablets, smart TVs and PCs (see Attachment C for an illustration of the way Sky provides content services); and
  - (b) the table in Annex A to that report is inaccurate as (amongst other things) it ignores the fact that Sky also provides free-to-air services. We have included in Attachment E a revised version of the table that corrects some inaccuracies.

### **Impact of the change to the definition of "telecommunication"**

9. It is important to keep in mind that removal of the previous parts (b) and (c) of the definition of "telecommunication" (which excluded for some purposes only "*any conveyance that constitutes broadcasting*" from the scope of "telecommunication") does not change the fundamental elements of that definition. It removes the previous exclusion, but this does not expand the definition of "telecommunication" to include "broadcasting". As part of interpreting the scope of "telecommunication" it is essential to recognise that the definition of "broadcasting" is and remains broader than "telecommunication", since telecommunication is about the *conveyance* of signals and content (but not the signals or content itself), whereas broadcasting is about both:
  - (a) a type of conveyance (a transmission for reception by the public, excluding certain on demand transmissions); and

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<sup>2</sup> See paragraph 80 of "The Regulatory Impact Statement: Reform of the Telecommunications Service Obligation Framework and Industry Levy Arrangements" (Ministry of Economic Development, 23 November 2010) which notes that the TDL "*Target the levy at the direct beneficiaries of the funded activities*". See also "Regulatory Impact Statement: Telecommunications Development Levy Extension:" (Ministry of Business, Innovation and Employment, 14 April 2015, page 6-7) which states that "*While TDL levy payers are telecommunications providers, these levy payers also receive direct benefits from levy spending. Funds are allocated to telecommunications service providers who win tenders to deploy infrastructure that would not otherwise be commercially viable.*"

<sup>3</sup> See paragraph 14 and Attachment F of this letter.

- (b) the particular type of content being transmitted (i.e. "programmes" as defined in the Broadcasting Act 1989).

This point is illustrated in Attachment B, and is reinforced by the fact that the Broadcasting Act regulates "programmes" while the Telecommunications Act does not.<sup>4</sup>

10. We agree with the Commission that the concept of broadcasting has been removed altogether from the definition of telecommunications, but this does not mean that "broadcasting services" are now included as part of "telecommunication". In particular, we support the Commission's long standing and consistent view that there is a distinction between the conveyance of a signal or content (a telecommunications service) and the content that is being conveyed (which is not a telecommunications service).<sup>5</sup> As noted by the Commission, this approach is consistent with the Commission's TSO cost allocation process, the purpose of the TDL, and the wording of the Act. The change to the definition of "telecommunication" does not change the Commission's view or approach.<sup>6</sup>
11. The Consultation Paper seems, in some places, to forget this distinction by comparing the basic elements of telecommunications and broadcasting (in Table 3 of the paper) in a way that incorrectly suggests they are the same thing. The paper includes inaccurate assertions like "*Traditional terrestrial television (terrestrial TV) is an example of a service that was likely previously excluded from telecommunication services, but would now be captured*" and "*Terrestrial TV meets the definition of telecommunication*" (the heading of Table 4) without proper justification.<sup>7</sup>
12. In other places the Consultation Paper recognises the distinction between "telecommunication" and "broadcasting". For example the statement in paragraph 63: "*Our view is, however, that the concept of a telecommunications service is not so broad as to include content or content aggregation service*".
13. The fact that the phrase "broadcasting service" is used in the Act (albeit only 3 times and only in section 85A, where one use is in the heading) does not mean that the Act now covers broadcasting services. The Act only covers "telecommunication" and "telecommunication services" as defined.<sup>8</sup> It is clear from the comments made by the Economic Development, Sciences and Innovation Select Committee about the definition of "telecommunication" and the treatment of content, and from the comments made in Parliament regarding the change to the definition of "telecommunication", that the change was intended to include *broadcasting transmission* only, rather than broadcasting or

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<sup>4</sup> The only references to content in the Telecommunications Act are in the phrase "*signs, signals, impulses, writing...*", etc used in the definitions of "line" and "telecommunication" (which is used to help describe those things).

<sup>5</sup> This view dates back to at least 2011/2012 and has been consistently applied by the Commission since then. For example see paragraph 40 of Attachment B and Attachment C of the "Liability allocation determination for the Telecommunications Development Levy for 1 July 2011 to 30 June 2012".

<sup>6</sup> Commerce Commission "Liability allocation determination for the Telecommunications Development Levy for 1 July 2018 to 30 June 2019" at paragraph 86 of Attachment A. The distinction between conveyance of content and the content being conveyed is based on the first part of the definition of "telecommunication" and not on the previous exclusion of broadcasting. This is reinforced by the fact that the distinction between *conveyance* and *content* has been used to exclude OTT on-demand services (which were never part of broadcasting) from the scope of "telecommunication", since those on-demand services relate to content not conveyance. See also footnote 17.

<sup>7</sup> Para 61 of the Consultation Paper. It may be that the transmission services whereby terrestrial TV signals are transmitted now fall within the definition of "telecommunication" but it is inaccurate to suggest through these types of statements that the whole terrestrial TV service (including the content of the service) is now part of "telecommunication".

<sup>8</sup> This is why section 85A uses the phrase "in relation to", since the purpose of s85A is to exclude revenue from the transmission of broadcasting content (i.e. the transmission that relates to the broadcast) rather than revenue from the broadcasting service as a whole (since that revenue cannot be revenue from telecommunication services).

broadcasting services as a whole.<sup>9</sup> The change to the definition of “telecommunication” was not part of the Telecommunications (New Regulatory Framework) Amendment Bill when it was first introduced, and no submissions on the Bill seem to reference the change. It appears that the change was only made after a Departmental Report raised the issue and recommended that “*traditional broadcasting distribution services*” be subject to regulatory scrutiny (seemingly because of free-to-air broadcasters raising concerns about Kordia).<sup>10</sup>

### Scope of the definition of "Liable Person"

14. While the change to the definition of telecommunication does somewhat widen the scope of both "telecommunication service" and "PTN" and that necessarily impacts on the scope of "liable person", that impact should not be overstated. It is clear that the intent of the change to the definition of telecommunication was to avoid technological anomalies, rather than increase the number of parties that would be subject to various levies (although this was noted as a *potential* consequence).<sup>11</sup>

15. The definition of liable person requires 2 key elements:

- (a) a person who provides a telecommunication service in New Zealand; and
- (b) use of a component of a PTN that is operated by that person.

16. A PTN means "*a network used or intended to be used, in whole or part, by the public for the purpose of telecommunication*". As noted by the Commission:<sup>12</sup>

*"In addition, the use of the network must not be proprietary to a single party. For example, networks used by emergency services are clearly not intended for use by the public, and are therefore not a PTN. There must be means by which a member of the public (used in a broad sense, but not necessarily including every possible member of the public) can feasibly obtain access to the network and use it to communicate with other persons."*

17. In the definition of "PTN", the inclusion of "used" is important. The Shorter Oxford Dictionary defines "used" to mean the "*cause (an implement, instrument, etc) to work, esp. for a particular purpose; manipulate, operate*". Given this, for a network to be "*used... by the public for the purpose of telecommunication*" necessarily requires that members of the public can cause or make that network to convey signals or content to another person. It requires a member of the public to bring about, or be the cause of, the conveyance.

18. The Commission has been careful, and consistent, in applying a narrow definition of PTN<sup>13</sup>. There is no basis to change this longstanding approach.

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<sup>9</sup> See Attachment F for the relevant statements made by Hon Kris Faafoi, Hon Clare Curran and Marama Davidson during the second and third readings of the Amendment Bill.

<sup>10</sup> See paras 166 to 172 of the "Departmental Report to the Economic Development, Science and Innovation Committee 10 April 2018" (**Departmental Report**).

<sup>11</sup> See para 171 of the Departmental Report which only references the possibility of Kordia paying more ("*However, Kordia may be required to contribute more to industry levies.*") and Attachment F.

<sup>12</sup> This extract is quoted in *REANNZ v Commerce Commission* [2018] NZHC 2724 at 51.

<sup>13</sup> This was discussed in *REANNZ v Commerce Commission* [2018] NZHC 2724 at 51 to 56. See also Commerce Commission "Draft Notification of Potential Liability for the Telecommunications Development Levy 2012" at paragraph 141-151, and Commerce Commission "Liability allocation determination for the Telecommunications Development Levy for 1 July 2018 to 30 June 2019" at paragraph 20-24.

### **Approach in the Consultation Paper**

19. It is not clear why the Commissioner has, in tables 5, 6, 7, 8 and 9, taken the preliminary view that compression/compressing and multiplexing, signal distribution and/or signal broadcasting in the context of DTT, satellite broadcasting, radio broadcasting, IPTV and OTT are "PTN (or component thereof)" (as set out in the right hand column of each of those tables).
20. That preliminary view is not explained and seems to mistakenly equate "PTN" with "telecommunication service". It is not clear that the right hand column (headed "PTN (or component thereof)") makes sense, since a PTN is a network, and the things being characterised (as set out in the left hand column of each table) are largely activities (the exception is the bottom row which deals with CPE).
21. It is wrong to characterise activities as a network. Whether or not a PTN is used for the purpose of the activity is a more detailed question that cannot be determined by the nature of the activity alone. As indicated above, whether or not a PTN is *used* needs to be assessed on the facts by reference to the definition of PTN, the Commission's previous narrow stance, and the guidance in *REANNZ v Commerce Commission* [2018] NZHC 2724.

### **Is Sky a liable person?**

22. It is clear that the purpose of the Amendment Act was not to make Sky a liable person,<sup>14</sup> and that it would be inequitable, and result in an unjustified cross-subsidiary, if Sky was to be treated as a liable person.<sup>15</sup>
23. While a telephone, mobile or broadband connection or service available to the public can clearly be used by the public for telecommunications, it is also clear that a one-way broadcasting transmission service that uses separate allocated capacity for the sole purpose of broadcasting programming to the public, cannot be said to be used or intended to be used by the public to convey signals. That would not make sense. There is no ability for, nor intention by, the public to use that transmission service for the purpose of telecommunications (i.e. to convey content or signals).<sup>16</sup>
24. Sky also provides on-demand and other content services (e.g. NEON, Sky Sport Now, and Sky Go) via OTT delivery. As recognised by the Commission, the provision of OTT content services does not result in the provider of that service operating a component of the PTN.<sup>17</sup>
25. For the above reasons, Sky does not believe that it falls within the definition of liable person. If the Commission has a contrary view, we would like an opportunity to understand the Commission's reasoning.

### **Treatment of aerials, satellite dishes and set-top boxes<sup>18</sup>**

26. Aerials, satellite dishes and set-top boxes are operated by end-users. Like other customer premises equipment (CPE), aerials, satellite dishes and set-top-boxes are not a "component of a

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<sup>14</sup> See paragraph 14 above.

<sup>15</sup> See paragraphs 5 to 7 above.

<sup>16</sup> Note: Ellis J states "*That an element of intention is required seems to me to be inherent in the idea that the relevant use must be for the purpose of telecommunication*". *REANNZ v Commerce Commission* [2018] NZHC 2724 at 76.

<sup>17</sup> Commerce Commission "Liability allocation determination for the Telecommunications Development Levy for 1 July 2011 to 30 June 2012" at paragraph 146. This has been consistently applied. See for example Commerce Commission, "Liability allocation determination for the Telecommunications Development Levy for 1 July 2018 to 30 June 2019" at Attachment B page 64.

<sup>18</sup> A satellite decoder is a set-top-box so we make no distinction between decoder and set-top-box (and there is no basis to do so).

PTN", since those devices are private and not a component of the public network for the purpose of the Act. To interpret this otherwise would result in a much wider scope of liable person, which would be inconsistent with past practice.<sup>19</sup>

27. Other consumer receiving devices (radios, phones, laptops) that have a built in aerial or antenna are treated as CPE and not as part of the PTN. It would be inconsistent, and lead to unfairness and anomalies, if other aerials located at customer premises were treated any differently. Regardless of ownership, aerials and antenna based at customer premises need to be treated consistently.
28. There is no logical distinction between a built in radio or mobile aerial or antenna, a DTT aerial and a customer satellite dish. All should be CPE and not components of a PTN.
29. Equally there is no logical distinction between a set-top-box used for DTT transmissions and a set-top-box or decoder used for satellite transmissions. Both should be CPE and not components of the PTN.
30. A set-top-box is private to a customer and actively used by a customer on a day to day basis (e.g. for selecting, recording and playing back content). A set-top-box is more like a mobile phone, PC or laptop than an ONT which is intended for public use and is a static device that a customer is not permitted to move or interfere with.

***Definition of broadcasting service and approach to advertising***

31. The Consultation Paper suggests applying the statutory definition of "telecommunication service" from the Act to determine the scope of what "broadcasting services" means in section 85A. This approach seems inappropriate and unjustified given that:
  - (a) the broad definition of "telecommunication service" in the Act is expressly set out in section 5 of the Act and is specific to the purposes and wording of the Act (i.e. that definition goes beyond the natural meaning of "service" in order to achieve the purposes of the Act), and there is no similar justification for adopting the wide definition of "broadcasting services";
  - (b) "broadcasting" is defined in the Broadcasting Act 1989 and "broadcasting service" is used in the Broadcasting Act (see section 39 and 81), in a way that is limited to a service (and does not extend to include goods, equipment and facilities); and
  - (c) the phrase "broadcasting service" is only used in section 85A of the Act, and it is not necessary for the purpose of that section to adopt a broad definition of "broadcasting services". This is because that section already uses the phrases "relates to" when referencing "broadcasting services".
32. In relation to revenue from the transmission of advertising, we can understand why the Commission might see this as being excluded by section 85A(1) from "qualified revenue". However, the better and proper analysis is that any revenue from advertising is just that; it is advertising revenue and is not, and cannot be, revenue from the provision of telecommunication services. It would be contrary to the purpose of the Act and the TDL to characterise it as such. An advertiser pays for the

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<sup>19</sup> This demarcation, and treatment of CPE, dates back to at least 2011/2012. See paragraphs 52 to 57 of the Commission's Notification of Potential Liability for the Telecommunications Development Levy 2012 (24 July 2012).

exposure of the advert, not for the conveyance of the advert (and advertising fees reflect that reality).

### **Approach to Qualifying Revenue**

33. We believe that Sky is not a liable person based on our analysis of the definition of "liable person" in the Act and its application to Sky's business and operation. However if we are wrong on that, and Sky is at law a liable person, then assessing what part, if any, of Sky revenue is "qualified revenue" is extremely problematic for a number of reasons, as discussed below.
34. To start with it is confusing that the Consultation Paper adopts the phrases "*broadcasting services revenue*" (used 9 times) and "*non-broadcasting services revenue*" (used 3 times) when neither of those phrases are used in the Act ("*broadcasting services*" is only used 3 times in the Act, with all those uses in s85A). The Commission must implement the TDL regime in accordance with the Act and adopting new terminology like this creates a real risk that it will fail to do so. It is clear from other parts of this submission that the change to the scope of "telecommunication" should not be overstated (see paragraphs 9 to 13 above) and the same goes for the impact of the Amendment Act on the definition of "qualified revenue". That definition does not refer to "broadcasting service revenue" and it would be contrary to the wording of the Act, and the purpose and justification for the TDL, to suggest that broadcasting services revenue falls within that definition.
35. It is not clear that Sky receives any revenue for a telecommunication service, since:
  - (a) the vast majority of Sky's revenue is for access to content, which is not a telecommunication service; and
  - (b) only revenue from providing a telecommunication service by means of a PTN can be "qualified revenue", but it is not clear that Sky receives any such revenue since:
    - (i) Sky makes services available via OTT (eg Sky Go, NEON and Sky Sport Now) which do not amount to a telecommunication service;
    - (ii) Sky makes services available on a free-to-air basis (Prime and the Broadcast tier channels) which are excluded by section 85A;
    - (iii) transmissions of pay channels and content via satellite transmission does not rely on a component of the PTN; and
    - (iv) it would be wrong to characterise revenue from activities other than the provision of telecommunications services (eg advertising revenue) as qualified revenue.
36. If, despite the comments above, the satellite transmissions and facilities that Sky utilises are deemed to be a component of the PTN, then it is difficult to see that there is any revenue received from those transmissions, since satellite transmissions are transmitted to the entire area of New Zealand without charge (a charge is made for the right to use an encryption key to decrypt and view specific content within the encrypted signal, but the conveyance via PTN is before and separate to this step).
37. If, notwithstanding the above, the Commission considers Sky is a liable person and that Sky does receive qualified revenue, then there does not seem to be a way to determine what that revenue is. While the definition of "qualified revenue" refers to the Commission setting specifications for

determining qualified revenue, this does not allow the Commission to convert what is revenue from the provision of content or other non-telecommunication activities into revenue from telecommunication services.

38. If, notwithstanding this submission, the Commissioner considers that Sky is a liable person that receives qualified revenue, then the Commission will need to develop a new methodology to fairly and reasonably determine what that revenue is. This is because:
- (a) the vast majority of Sky's revenue relates to the availability of content and other non-telecommunication activities rather than the conveyance of signals, and in the most part there is no separation of any conveyance revenue (which is different to most, if not all, other liable persons);
  - (b) applying the current methodology (gross revenue less costs of non-telecommunication services) to Sky could result in an unfair and discriminatory result for Sky (since unlike other liable persons, Sky's revenue is largely received for the provision of content and other non-telecommunication activities, so only subtracting content and other non-telecommunication costs would be grossly unfair and discriminatory to Sky); and
  - (c) Sky's services are complex and involve multiple pathways for providing content to subscribers (see Attachment C) as well as other services like access to set-top-box functionality such as programme recording and play-back (see Attachment D). Any methodology would need to fairly deal with this complexity.

#### **Concluding remarks**

39. The Amendment Act was not intended to make Sky a liable person for the purpose of the TDL. To do so would be inequitable and result in an unjustified cross-subsidisation that is inconsistent with the purpose of the TDL.
40. In addition, to apply the TDL regime to Sky would be extremely problematic, if not impossible for the reasons stated above.
41. While other submitters may encourage the Commission to cast a wider net for those liable for the TDL (given that would result in them paying less) the *REANNZ* case illustrates the need for the Commission to tread carefully and apply the Act, and particularly the TDL provisions, in a careful and proper manner consistent with their purpose.
42. We would welcome the opportunity to discuss our concerns with you.

Yours sincerely

**SKY NETWORK TELEVISION LIMITED**



Chris Major  
Director of External Affairs

## ATTACHMENT A

### Answers to specific questions

**Table 10: Consolidated consultation questions for all stakeholders**

1.	Do you agree that telecommunications service does not include content and content aggregation services?	Yes. See paragraphs 9 to 13 of the letter.
2.	Do you agree with the views expressed in Table 5?	No. See paragraphs 19 to 21 of the letter. The characterisation of compression and multiplexing, signal distribution and signal broadcasting as "PTN (or component thereof)" seems wrong and unjustified. We think the Commission will need to do a closer analysis of the networks being used to determine whether they qualify as a component of the "PTN" as defined in the Act. We also think that aerials and set-top-boxes are not PTN (see #3 below).
3.	Should DTT aerials and set-top-boxes be regarded as part of a PTN?	No. See paragraphs 26 to 30 of the letter.
4.	Do you agree with the views expressed in Table 6?	No. See paragraphs 19 to 21 of the letter. The characterisation of compressing and multiplexing, signal distribution and signal broadcasting as "PTN (or component thereof)" seems wrong and unjustified. We think the Commission will need to do a closer analysis of the networks being used to determine whether they qualify as a component of the "PTN" as defined in the Act. We also think that satellite dishes and decoders are CPE and not PTN (see #6 below).
5.	Do you agree that, where a satellite is transmitting signals to New Zealand, the satellite operator is providing a telecommunications service in New Zealand?	We do not think this can be the case, and question the jurisdictional basis for applying the Act to a satellite which is not located in or above New Zealand. We also believe the satellite transmissions do not involve the use of component of the PTN for the reasons stated in paragraphs 14 to 23 of the letter.
6.	Should satellite dishes and decoders be regarded as part of a PTN?	No. See paragraphs 26 to 30 of the letter.
7.	Do you agree with the views expressed in Table 7?	No. See paragraphs 19 to 21 of the letter. The characterisation of compressing and multiplexing, signal distribution and signal broadcasting as "PTN (or component thereof)" seems wrong and unjustified. We think the

		Commission will need to do a closer analysis of the networks being used to determine whether they qualify as a component of the "PTN" as defined in the Act.
8.	Do you agree with the views expressed in Table 8?	No. See paragraphs 19 to 21 of the letter. The characterisation of compressing and multiplexing, signal distribution and signal broadcasting as "PTN (or component thereof)" seems wrong and unjustified. We think the Commission will need to do a closer analysis of the networks being used to determine whether they qualify as a component of the "PTN" as defined in the Act.
9.	Do you agree with the views expressed in Table 9?	No. See paragraphs 19 to 21 of the letter. The characterisation of compressing and multiplexing, signal distribution and signal broadcasting as "PTN (or component thereof)" seems wrong and unjustified. We think the Commission will need to do a closer analysis of the networks being used to determine whether they qualify as a component of the "PTN" as defined in the Act.
10	Do you agree that broadcasting services means "any goods, services, equipment, and facilities that enable or facilitate broadcasting"?	No. We do not think such a broad interpretation is necessary or justified. See paragraph 31 of the letter.
11	Do you agree that anything that enables or facilitates the transmission of advertising programmes is a broadcasting service, and therefore falls within the exclusion in section 85A(1)?	Yes, assuming the transmission of the advertising is part of a broadcasting service. We also believe that revenue for providing advertising cannot be telecommunications revenue, since the advertiser is paying for exposure of the advert not the conveyance of the advert. See paragraph 32 of the letter.
12	Do you agree that all revenue received from the transmission of on demand programmes should be treated as non-broadcasting services revenue (ie, not be subject to section 85A)?	Yes. To do otherwise would be inconsistent with the approach taken to such on-demand services since about 2012 (if not before). See footnote 17 to the letter.
13	Should revenue received from the supply of broadcasting services to free-to-air broadcasters be subject to section 85A(1)(a)?	If by broadcasting services, the Commission means transmission services (which we think is the intention) then yes to the extent that the transmission service is for a free-to-air broadcasting service.

14	Should the Commission set specifications under section 85A(2)? If yes, please give reasons why and explain what the specifications should address.	This would depend on whether there is a need for this. In particular is there an apportionment issue. This will depend on information provided by other parties.
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**Table 11: Consolidated consultation questions for broadcasting service providers**

15	Do you expect that your company will meet the revised definition of liable person?	We are not sure. We do not think so based on our analysis of what a liable person is. See paragraphs 14 to 25 of the letter.
16	Do you expect that your company will earn qualified revenue (under the new definition)?	We are not sure, but do not think so. This depends on: (a) whether Sky is a liable person (see #15 above); and (b) if it is, whether there is a basis to characterise any of Sky's revenue as falling within the definition of qualified revenue. There is a major issue about this possibility. See paragraphs 33 to 38 of the letter.
17	If you are a 2018/19 QLP do you expect that your qualified revenue will change in future TDL disclosures due to the Amendment Act?	N/A.
18	Are you expecting that a portion of your gross telecommunications revenue will meet the criteria for section 85A(1)(a)?	Yes. Sky provides free-to-air broadcast services, both via Prime and via the broadcast tier.

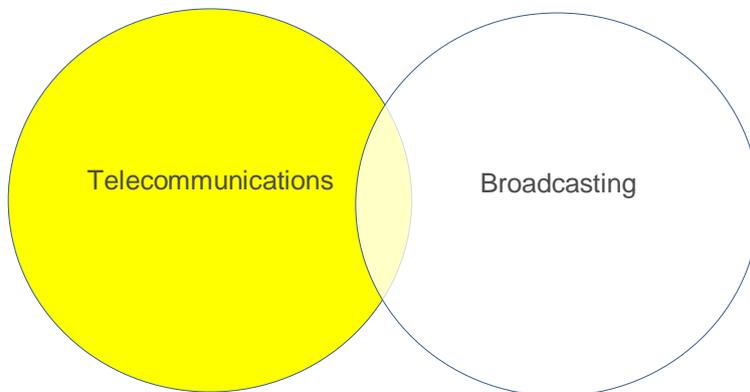
## ATTACHMENT B

### The Definition of Telecommunication

#### Notes:

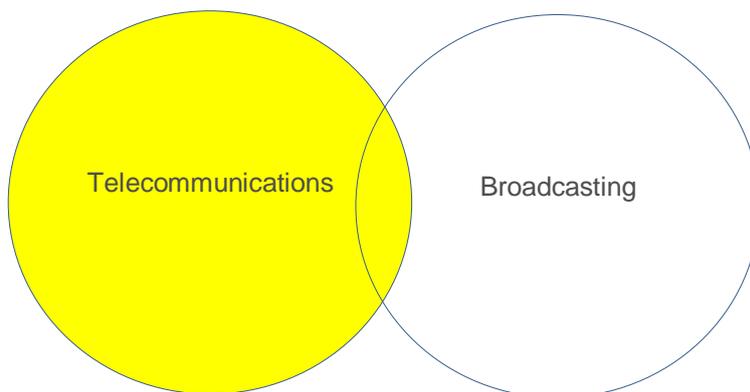
- The scope of the definition of "telecommunication" is represented by the yellow shading in Parts A and B. Part C is for illustration purposes only.
- The scope of definition of "telecommunication" before the Amendment Act is shown in Part A. The impact of the Amendment Act is shown in Part B below (it only removes the exclusion of the overlap in the definitions).
- The impact of the Amendment Act is not to expand telecommunication to encompass the whole of broadcasting (see Part C).

#### Part A - Definition of "telecommunication" prior to the Amendment Act



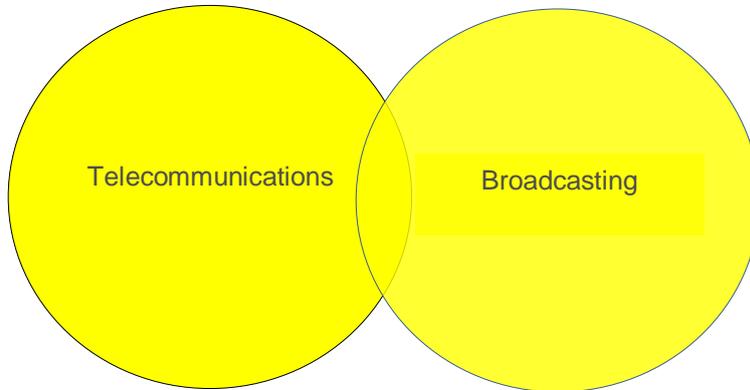
The overlapping area is only light yellow, since "conveyance that constitutes broadcasting" was included for sub-part 2 of Part 4 of the Act, but for all other purposes was excluded.

#### Part B - Definition of "telecommunication" after the Amendment Act



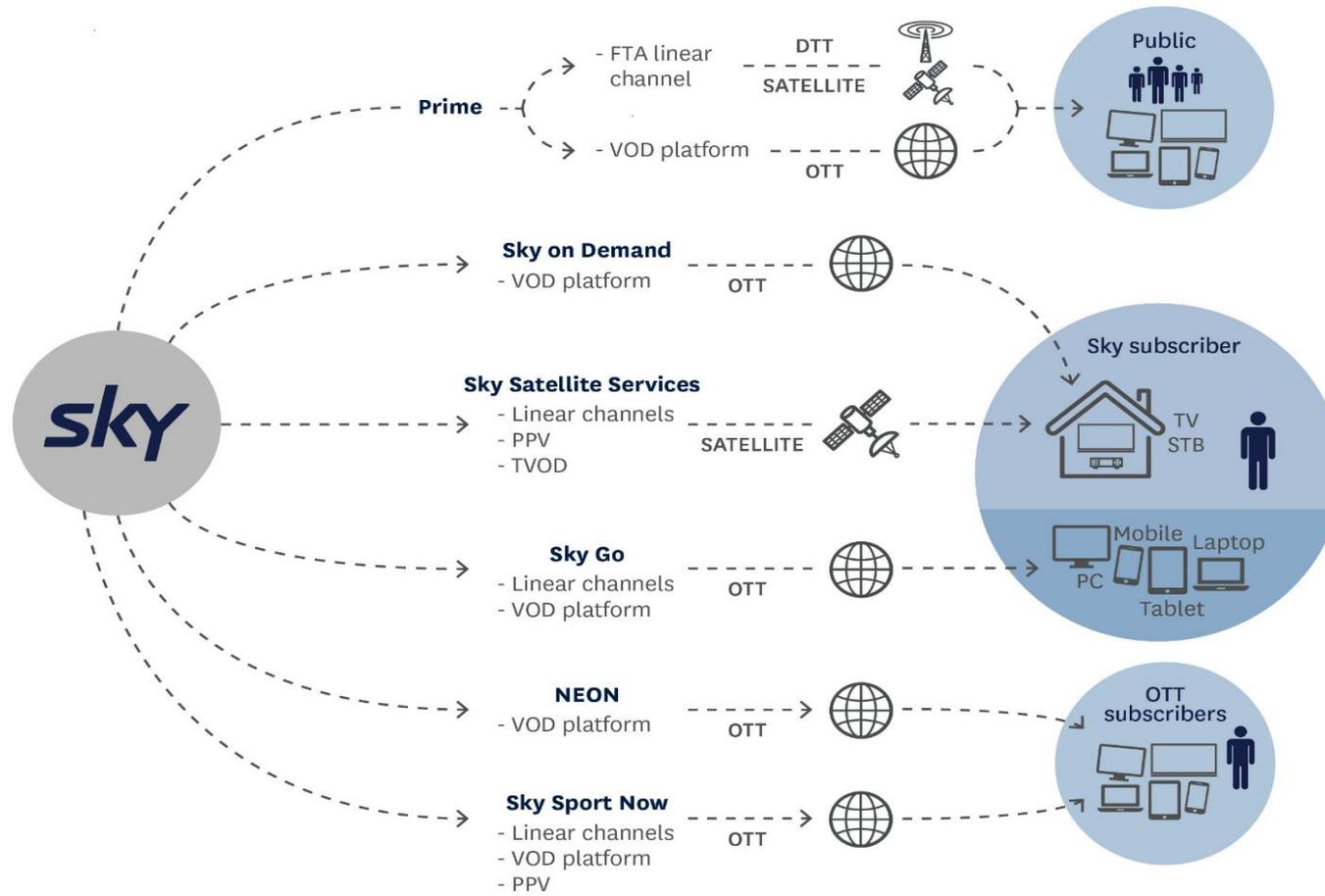
**Part C – For illustration only: This is not the effect of the Amendment Act**

It is not the case that the change to the definition of "telecommunication" in the Amendment Act resulted in the inclusion of broadcasting within the definition of telecommunication.



# ATTACHMENT C

## Illustration of Sky's content services



## ATTACHMENT D

### Elements of a typical Sky Subscription

What the subscriber gets and is paying for	Is this telecommunications revenue?
1. Access to linear channels delivered via the satellite.	No. This is a payment for content.
2. Access to linear channels delivered to non-STB devices via Sky Go.	No. This is a payment for content. This content is supplied via OTT.
3. Access to on-demand content.	No. This is a payment for content. This content is supplied via OTT.
4. Access to transactional and pay per view content (optional extra).	No. This is a payment for content. Most of this content can be accessed via the STB or via Sky Go (where it is accessed via Sky Go it is delivered via OTT).
5. Access to channel listings and programme synopsis.	No. This is a payment for content.
6. Access to the Skywatch Magazine (optional extra).	No. This is a payment for a magazine delivered in hard copy.
7. Access to STB functionality like the ability to fast forward, rewind, record, store, playback, search for and schedule programming (some of which are optional extras).	No. This is a payment for use of functionality that relates to the selection and viewing of content.

## ATTACHMENT E

### Additions to Annex of the Analysys Mason's report

Additions and corrections are highlighted in yellow

Name	Platform					Content type		Business model		
	DTT	DTH	Cable TV	IPTV	OTT	Linear	On demand	FTA	Subscription	PPV
Sky TV		X	X	X	X	X	X		X	X
Neon (Sky)					X		X		X	
Sky Sport Now (Sky)					X	X	X		X	
Vodafone (former Telstra Saturn)			X	X	X	X	X		X	
Lightbox (Spark)					X		X		X	X
Spark Sport					X		X		X	X
Netflix					X		X		X	
Disney Plus					X		X		X	
Google Play Film & TV					X		X			X
Prime Video					X		X		X	X
TVNZ	X	X	X	X	X	X	X	X		
Mediaworks	X	X	X	X		X	X	X		
Prime (Sky)	X	X	X	X		X	X	X		

## ATTACHMENT F

### Commentary on the change of the definition of 'telecommunication'

Commentary on the change of the definition of 'telecommunication' in the Telecommunications (New Regulatory Framework) Amendment Bill (**the Bill**):

- **Report from the Economic Development, Science and Innovation Committee on the Bill:** "Clause 4 would amend some of the definitions in section 5 of the Act. As introduced, it does not change the definition of "telecommunication" in the Act, which currently excludes broadcasting transmission services (except in subpart 2 of Part 4). We believe the current definition could lead to anomalies in the future because of the way technological change ("convergence") is breaking down the boundaries between providers of broadcasting and telecommunications services. We recommend inserting clause 4(6) to replace the definition of "telecommunication" in section 5 of the Act with a new definition that includes broadcasting transmission services. We believe this would provide more consistency of treatment between different technologies. The new definition of "telecommunication" would not cover content and aggregation services. We note that some entities may be required to contribute industry levies as a result of this change to the definition." (page 2).
- **The Bill – Second Reading:** "The convergence of broadcasting technologies is blurring the boundaries between providers of broadcasting and telecommunications services. For example, it's now common for consumers to stream television through the internet. To address this issue, the committee accepted advice and recommended that the definition of "a telecommunication" be amended to include broadcasting transmission services also. This proposed change could improve consistency in how the servers are treated in the future, particularly given the emergence and growth of fibre as a means of transmission for TV. The commission will be able to monitor or investigate the commercial conditions for digital terrestrial transmission through its existing Telecommunications Act processes, if this is needed." (Hon Kris Faafoi, Minister of Broadcasting, Communications and Digital Media) in Hansard.
- **The Bill – Third Reading:** "The third thing I want to mention is around the definition of "telecommunications", and while I don't think anyone's mentioned this yet, this is actually pretty important. On the face of it, it doesn't seem that important, but what it does is it brings "broadcasting transmission" within the definition of "telecommunications". What that means is that the regulator, the Commerce Commission, can actually have some powers in that area. We won't see the impact of that for a while, but it means that broadcasting transmission is no longer in an unregulated space, which was a ridiculous anomaly in our system." (Hon Clare Curran, Labour, Dunedin South) in Hansard.
- **The Bill – Third Reading:** "I welcome this legislation because historically, yes, it appears the broadcasting transmission platform was totally unregulated, and I was thinking about a bit of a parallel. I think that if we're getting this put in place at this stage, it will, hopefully, allow us down the road to not get into some real trouble, particularly for consumers and just ordinary people around the country—the likes of which we have seen, for example, with what the Lines Company are doing for power distribution around the country and how that is not fair right now. So I think this is a good step." (Marama Davidson, Co-Leader, Green) in Hansard.