

29 October 2020

Juliet Walton
Now New Zealand Limited
2 Bridge Street
Ahuriri
Napier 4110
New Zealand

By email only: juliet.walton@nownz.co.nz

Dear Juliet,

Now New Zealand Limited – compliance advice

1. The purpose of this letter is to inform you that the Commerce Commission (**Commission**):
 - 1.1 has completed its investigation into Now New Zealand Limited's (**NowNZ's**) potential contravention of section 83 of the Telecommunications Act 2001 (**the Act**)¹ in respect of the 2018/2019 Telecommunications Development Levy (**TDL**) Liability Allocation Determination (**liability allocation determination**);
 - 1.2 considers that NowNZ is likely to have breached section 83² by not providing us with correct specified information and audit/assurance information by 20 September 2019; and
 - 1.3 has decided that in the circumstances the appropriate response is to provide compliance advice to NowNZ in relation to its likely non-compliance with section 83.

¹ All statutory references in this letter are to the Telecommunications Act 2001.

² Compliance advice is not a definitive finding of non-compliance; only the Courts can definitively decide whether a breach of the law has occurred.

Specified information and assurance required to be provided

2. Section 83(1) requires each liable person that is not exempt via the operation of section 81 (a qualifying liable person or **QLP**) to supply us with:³
 - 2.1 all prescribed information, or if there is no prescribed information, all information that we specify so as to enable us to make the liability allocation determination in accordance with section 88(a);⁴ and
 - 2.2 a report prepared by a qualified auditor in accordance with an auditing and assurance standard, as specified by the Commission, or an alternative form of assurance specified by the Commission that the Commission is satisfied will enable it to make the liability allocation determination.⁵
3. There being no prescribed information, on 27 June 2019 we specified the information we required under section 83(1)(a) (**specified information**) and the audit report or alternative assurance information (**audit/assurance information**) required under section 83(1)(b) from all QLPs for the 2018/2019 financial year.⁶
4. Under section 83(1), the specified information and audit/assurance information were due no later than 60 working days after the end of the 2018/2019 financial year. Under section 5, a financial year ends on 30 June. The due date for the provision of the specified information and audit/assurance information was therefore 20 September 2019.

Investigation of NowNZ's compliance with section 83

5. NowNZ was a QLP for the 2018/19 TDL and was therefore required to provide us with specified information and audit/assurance information by 20 September 2019.
6. For the 2018/19 TDL year, NowNZ had:
 - 6.1 the default option of providing an assurance report;⁷ or

³ Section 83 refers to "liable persons". However, section 81 exempts certain liable persons from the operation of subpart 2, including section 83. We therefore refer to liable persons that are not exempt from subpart 2 as qualifying liable persons.

⁴ Section 83(1)(a).

⁵ Section 83(1)(b).

⁶ The relevant specified information and assurance report instructions and templates are available here: <https://comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunications-development-levy-tdl/201819-tdl-liability-allocation-determination?target=documents&root=156521>.

⁷ See para 99 of the specified information and assurance report instructions.

6.2 the alternative option of providing an audit report where the QLP has a year end other than 30 June 2019, and provided that the audit report meets certain other requirements.⁸ The key requirements are:

6.2.1 the QLP's statutory financial statements to be prepared in accordance with the Tier 1 requirements as per XRB A1 Application of the Accounting Standards Framework (XRB A1);⁹ and

6.2.2 the statutory financial statements or the notes to the statutory financial statements separately disclosed for either the TDL year ending 30 June 2019 or the reporting period covered by the QLP's statutory financial statements to set out:

- (a) the QLP's gross telecommunications services revenue;¹⁰ and
- (b) any deduction from gross telecommunications services revenue that is disclosed in Template 1 and that exceeds 1% of the QLP's gross telecommunications services revenue.¹¹

7. On 20 September 2019, NowNZ provided specified information and audited Tier 2 financial statements in accordance with New Zealand Equivalents to International Financial Reporting Standards Reduced Disclosure Regime (NZ IFRS RDR).
8. However, NowNZ did not provide an assurance report in line with the default option, referred to in paragraph 6.1 above, by 20 September 2019.
9. NowNZ had a year end other than 30 June 2019, but it did not, as an alternative to providing an assurance report, provide an audit report, by 20 September 2019, that met the requirements referred to in paragraph 6.2.1 and 6.2.2 above.
10. We sent a notice of investigation to NowNZ on 20 August 2020.¹² In this letter we:
 - 10.1 informed NowNZ that we had begun an investigation into NowNZ's potential contravention of section 83 in respect of the 2018/2019 TDL liability allocation determination; and

⁸ See para 101 of the specified information and assurance report instructions.

⁹ This includes 31 March 2019 year ends.

¹⁰ In the case of gross telecommunications services revenue that is earned by interconnected bodies corporate that prepare their own statutory financial statements, gross telecommunications services revenue may be disclosed in the statutory financial statements either as a single consolidated value or as bodies corporate specific values in the individual statutory financial statements.

¹¹ This applies to total payments made to other QLPs; total payments made to non-QLPs for services initially provided by a QLP; and total cost of non-telecommunications goods and services included in gross telecommunications services revenue.

¹² Commission letter (by email) to NowNZ, Notice of investigation into potential contravention of Section 83, 20 August 2020.

- 10.2 sought an explanation of why NowNZ failed to supply the required audit/assurance information, as well as any information that NowNZ considered relevant in showing that NowNZ had a reasonable excuse for its failure to comply with section 83.
- 11. We received NowNZ's response on 1 September 2020. NowNZ considered that it had a reasonable excuse for the non-compliance in respect of the 2018/19 TDL submission. NowNZ noted that the non-compliance was inadvertent and in spite of NowNZ's attempts to clarify the applicable reporting requirements, it did not involve any deliberate attempt to subvert the Act's regulatory framework or objectives.
- 12. Based on the information provided to us, we do not consider that NowNZ had a reasonable excuse for its failure to comply with section 83. The principal reasons we considered that NowNZ did not have a reasonable excuse are:
 - 12.1 NowNZ did not adequately review the specified instructions that were published and sent to them on 27 June 2019; and
 - 12.2 the reasons provided were either of its own making, or within its control (or both).

Available enforcement responses for a breach of section 83

- 13. In response to a contravention of section 83, the Commission may:
 - 13.1 take no further action;
 - 13.2 issue compliance advice;
 - 13.3 issue a warning letter;
 - 13.4 serve a civil infringement notice under section 156D incorporating a penalty of \$2,000;¹³ or
 - 13.5 apply to the High Court for an order requiring payment of a pecuniary penalty to the Crown under section 156L.¹⁴
- 14. Section 156L(3)(c) empowers the High Court to impose a penalty of up to \$300,000 for a breach under section 156A(1)(k).

Our decision to issue compliance advice

- 15. Based on our assessment of the non-compliance, we have decided to issue NowNZ with compliance advice.

¹³ As set out in clause 3 of the Telecommunications (Civil Infringement Notice) Regulations 2007.

¹⁴ Under sections 156A(1)(k) and 156B(1), the Commission may take one of the actions in paragraph 13.4 or 13.5 where a person has failed, without reasonable excuse, to comply with section 83.

16. The Commission uses enforcement criteria to assist in deciding whether to take enforcement action in response to a statutory contravention and to assist it in deciding what enforcement action to take.¹⁵ The Commission's enforcement criteria are:
 - 16.1 extent of detriment;
 - 16.2 seriousness of conduct; and
 - 16.3 public interest.
17. The Commission must also take into account the matters listed in section 156C when deciding what action to take in respect of a contravention of section 83.¹⁶
18. In exercising our enforcement discretion, we have considered the following factors under our enforcement criteria:

Extent of detriment

19. The final liability allocation determination was not materially impacted; and
20. NowNZ's share of the qualifying revenue for the 2018/19 TDL was only 0.17%, so even if its qualifying revenue changed significantly, it would not have had a material effect on other QLPS.

Seriousness of conduct

21. It appears that NowNZ's non-compliance was not intentional; and
22. NowNZ has informed us that it has updated its systems and policies to ensure future compliance.

Public interest

23. There is unlikely to be widespread interest in the issue; and
24. A decision not to take enforcement action would not be likely to undermine public confidence in the law.

¹⁵ The Commission's enforcement criteria are set out at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>

¹⁶ See sections 156A(1)(k), 156B and 156C.

Our expectations regarding NowNZ's future compliance

25. We take non-compliance with section 83 and the requirements of the Telecommunications Act seriously. The failure to provide the specified information and audit/assurance in line with the requirements may lead to incomplete or inaccurate information, which may have a material impact on other QLPs.
26. All QLPs are responsible for ensuring that they comply with section 83. Each QLP should therefore ensure that it has appropriate risk management and quality controls in place to ensure that the information and auditor's report required under section 83 comply with all the relevant requirements.
27. While we are not taking any further action against NowNZ in relation to this matter, we will take this compliance advice into account if NowNZ engages in similar conduct in the future. We may also draw this compliance advice to the attention of a court in any subsequent proceedings brought by the Commission against NowNZ.

Further information

28. This compliance advice is public information and will be published on our website.
29. Please contact Michael Callan on (04) 924 3818 or by email at michael.callan@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stephen Bass
Head of Compliance and Investigations
Regulation Branch, Commerce Commission