

30 May 2019

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Dear Vaughan

## **Warning about breach of Section 83 of the Telecommunications Act 2001**

### **Purpose**

1. The purpose of this letter is to warn MyRepublic Limited (**MyRepublic**) that the Commission considers its failure, without reasonable excuse, to comply with section 83 of the Telecommunications Act 2001 in respect of the 2017/2018 Telecommunications Development Levy Liability Allocation Determination (**liability allocation determination**) is likely to be a breach<sup>1</sup> of the Act<sup>2</sup>.
2. Compliance with section 83 is important because the Part 3 regulatory scheme relies on the complete and accurate provision of information to ensure the integrity of the liability allocation determination process and the fair and accurate allocation of the levy. This is particularly because incomplete or inaccurate information may have a material impact on other QLPs.

### **Specified information and assurance required to be provided**

3. 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:<sup>3</sup>
  - 3.1 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)<sup>4</sup>; and

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<sup>1</sup> A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred.

<sup>2</sup> All statutory references in this letter are to the Telecommunications Act 2001.

<sup>3</sup> 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.

- 3.2 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.<sup>5</sup>
4. There being no prescribed information, on 29 June 2018 we specified the information we required under section 83(1)(a) (**specified information**) and the audit report or alternative assurance information (**audit/assurance information**) under section 83(1)(b) from all QLPs for the 2017/2018 financial year<sup>6</sup>. The Commission specified that information for the purpose of enabling us to make our liability allocation determination in accordance with section 88(a).
  5. Under section 83(1), the specified information and audit/assurance information were due no later than 60 working days after the end of the 2017/2018 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 2018.
  6. MyRepublic was a QLP for the 2017/18 Telecommunications Development Levy (**TDL**) and was therefore required to provide us with specified information and audit/assurance information by 20 September 2018.
  7. MyRepublic did not provide the audit/assurance information by 20 September 2018. MyRepublic did provide confirmation from its auditor in December 2018 that no material adjustments were proposed to the company's audited revenue figures. That confirmation did not, however, meet the requirements of the audit/assurance information specified by the Commission, because MyRepublic did not provide a report consistent with the Commission's audit/assurance information instructions.
  8. Despite this, we were satisfied that the confirmation was, in the specific circumstances of this case, sufficient to enable us to make the liability allocation determination. We also considered it was preferable to make the liability allocation determination in reliance on the confirmation provided by MyRepublic rather than delay the making of the liability allocation determination beyond the statutory deadline.
  9. MyRepublic did provide some information to the Commission on 20 September 2018. However, the information it provided did not comply with the Commission's

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<sup>4</sup> Section 83(1)(a).

<sup>5</sup> Section 83(1)(b).

<sup>6</sup> 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/201718-tdl-liability-allocation-determination?target=documents>.

specified information instructions, because MyRepublic incorrectly deducted early termination payments in its qualified revenue calculation<sup>7</sup>.

### **Alleged breach of section 83**

10. Under sections 156A(1)(k) and 156B, the Commission may take enforcement action where a person fails, without reasonable excuse, to comply with section 83. The enforcement options available to the Commission are set out under the heading below.
11. MyRepublic failed to comply with section 83 in the following ways:
  - 11.1 MyRepublic did not provide the audit/assurance information by 20 September 2018 in contravention of section 83(1)(b). The audit confirmation provided by MyRepublic was provided in December 2018 and did not comply with the Commission's audit/assurance information instructions because it was not a report prepared in accordance with those instructions.
  - 11.2 MyRepublic did not provide the specified information by the Commission by 20 September 2018 in contravention of section 83(1)(a). The information did not comply with the Commission's specified information instructions because MyRepublic incorrectly deducted early termination payments in its qualified revenue calculation.
12. In respect of the first contravention above, MyRepublic informed the Commission that the accounts had not been able to be audited by 20 September 2018, but provided no further reasons. MyRepublic did not provide any reasons for failing to provide an audit report prepared in accordance with the Commission's audit/assurance information instructions. In respect of the second contravention above, it appears that MyRepublic misapplied the Commission's specified information instructions when it deducted early termination payments. If MyRepublic had obtained the audit/assurance information from its auditor, that information may well have identified the incorrectly deducted early termination payments.
13. Based on the information provided to us, we do not consider that MyRepublic had a reasonable excuse for its failures to comply with section 83.

### **Available enforcement responses for a breach of section 83**

14. Under sections 156A(1)(k) and 156B(1), the Commission may take one of the following actions where a person has failed, without reasonable excuse, to comply with section 83:
  - 14.1 serve a civil infringement notice under section 156D incorporating a penalty of \$2,000;<sup>8</sup> or

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<sup>7</sup> The Commission added the incorrectly deducted amounts to MyRepublic's qualifying revenue for the final liability allocation determination.

- 14.2 apply to the High Court for an order requiring payment of a pecuniary penalty to the Crown under section 156L.
15. 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 a warning**

16. Based on our assessment of the non-compliance, we have decided to issue MyRepublic with a warning rather than taking enforcement action under section 156B(1) at this time.
17. The Commission uses enforcement criteria to assist it in deciding whether to take enforcement action in response to a statutory contravention and to assist it in deciding what enforcement action to take.<sup>9</sup> The Commission's enforcement criteria are:
- 17.1 extent of detriment;
- 17.2 seriousness of conduct; and
- 17.3 public interest.
18. In exercising our enforcement discretion, we have considered the following factors under our enforcement criteria:

#### *Extent of detriment*

- 18.1 the final liability allocation determination was not delayed, because MyRepublic provided auditor confirmation in December 2018 that was, in the specific circumstances of this case, sufficient to enable us to make the liability allocation determination;
- 18.2 MyRepublic's share of qualifying revenue for the 2017/18 TDL was only 0.1%, so even if its qualifying revenue changed significantly, it would not have had a material effect on other QLPs;

#### *Seriousness of conduct*

- 18.3 MyRepublic was a new QLP in 2017/18;
- 18.4 it appears that MyRepublic's non-compliance was not intentional;
- 18.5 MyRepublic has previously been compliant;

#### *Public interest*

- 18.6 There is unlikely to be widespread public interest in this issue; and

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<sup>8</sup> As set out in clause 3 of the Telecommunications (Civil Infringement Notice) Regulations 2007.

<sup>9</sup> The Commission's enforcement criteria are set out at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>

- 18.7 A decision not to take enforcement action would not be likely to undermine public confidence in the law.

### **Our expectations regarding MyRepublic's future compliance**

19. We take non-compliance with section 83 and the requirements of the Telecommunications Act seriously. The failure to provide the audit/assurance information may lead to incomplete or inaccurate information, which may have a material impact on other QLPs. Compliance with the due date is also important to the smooth operation of the liability allocation determination process and the timely collection of the levy.
20. 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 are provided by the due date.
21. While we will not be taking any further action against MyRepublic at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against MyRepublic.
22. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

### **Further information**

23. This warning letter is public information and will be published on our website.
24. Please contact Mark Leslie, Legal Counsel, on direct dial 04 924 3888 or by email at [mark.leslie@comcom.govt.nz](mailto:mark.leslie@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Gale', with a stylized flourish at the end.

Stephen Gale  
Telecommunications Commissioner