

10 March 2021

Frazer Scott
Chief Executive Officer
Plan B Group
5 Omega Street
Rosedale
Auckland 0632

Dear Frazer,

Warning about likely breach of Section 83 of the Telecommunications Act 2001

Purpose

1. The purpose of this letter is to warn Plan B Group (**Plan B**) that the Commerce Commission (**Commission**) considers its failure to comply with section 83 of the Telecommunications Act 2001 (**Act**),¹ in respect of the 2019/20 Telecommunications Development Levy (**TDL**) Liability Allocation Determination (**LAD**), is likely to be an actionable breach of the Act.

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:²
 - 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 LAD in accordance with section 88(a);³ 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 LAD.⁴

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

² 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 Section 83(1)(a).

⁴ Section 83(1)(b).

3. There being no prescribed information, on 30 June 2020 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 2019/2020 financial year.^{5, 6} The Commission specified that information for the purpose of enabling us to make the LAD in accordance with section 88(a).
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 2019/2020 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 22 September 2020.
5. Plan B was a QLP for the 2019/20 TDL year and was therefore required to provide the Commission with specified information and audit/assurance information by 22 September 2020.
6. On 22 September 2020, Plan B provided the Commission with specified information and statutory financial statements for the year ended 31 March 2020, prepared in accordance with New Zealand Equivalents to International Financial Reporting Standards Reduced Disclosure Regime. However, Plan B did not provide the Commission with the following by 22 September 2020:
 - 6.1 an assurance report, as required under the default option;⁷ or
 - 6.2 statutory financial statements that separately disclosed gross telecommunications services revenue and deductions, an auditor's report prepared for its statutory financial statements, and a director or Chief Financial Officer (**CFO**) certification of its specified information, as required under the alternative option.⁸

⁵ 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/201920-telecommunications-development-levy-liability-allocation-determination?target=documents&root=219076>

⁶ On 14 August 2020 we published a revised version of our specified information and assurance report instructions. The revised version amended paragraph 94.2 to remove the requirement that QLPs who have the option of providing an audit report and have a year-end other than 30 June 2020 must prepare their accounts in accordance with Tier 1 accounting standards. No other changes were made to the specified instructions. The revised version is available here: https://comcom.govt.nz/_data/assets/pdf_file/0027/219618/Specified-information-and-assurance-report-instructions-for-2019-20-TDL-Revised-version-14-August-2020.pdf

⁷ See para 90 of the specified information and assurance report instructions.

⁸ See paras 91 and 94 of the specified information and assurance report instructions.

7. On 25 September 2020, Plan B provided the Commission with amended statutory financial statements, which included a signed auditor's report. However, the amended statutory financial statements did not meet the requirements under the alternative option and the signed auditor's report did not meet the requirements under the default option or the alternative option. A certification in respect of Plan B's specified information was also not provided.
8. On 22 December 2020, Plan B submitted an assurance report for its specified information and a CFO certification. By submitting an assurance report for its specified information, Plan B thereby satisfied the requirements of the default option and brought itself into compliance with section 83 for the 2019/20 TDL year, albeit three months after the due date.

Likely actionable breach of section 83

9. 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 at paragraph 13 below.
10. In respect of the failures to comply with section 83 outlined at paragraphs 6 to 7 above, Plan B explained that:

'...the omission to provide the auditor's confirmation was inadvertent and caused by a misunderstanding that arose in the course of Plan B's communications with the Commission about the nature of the auditor's opinion required';⁹ and

'This year was the first time Plan B met the \$10 million revenue threshold for an entity to be a QLP, and thereby have further obligations under s 83'.¹⁰

11. Based on the information provided to us, we do not consider that Plan B had a reasonable excuse for its failure to comply with section 83. We do not consider the evidence demonstrates that Plan B's omission to provide an auditor's confirmation of its specified information (and therefore breach its TDL obligations) was inadvertent and caused by a misunderstanding. Rather, we consider that Plan B knowingly failed to comply with its TDL obligations, in particular because Plan B questioned whether it should have to incur the cost of the auditor's confirmation, indicating it understood that the auditor's confirmation was required.¹¹
12. For these reasons, we consider that Plan B likely breached the requirements of section 83 without reasonable excuse and as a result the Commission may take enforcement action against Plan B.

⁹ Paragraph 3, letter from Plan B to the Commission, dated 30 November 2020.

¹⁰ Paragraph 7, letter from Plan B to the Commission, dated 30 November 2020.

¹¹ Phone call between the Commission and Plan B's CFO 8 September 2020; email from Plan B's CFO to the Commission 22 September 2020.

Available enforcement responses for a breach of section 83

13. In response to a breach of section 83, the Commission may:¹²
 - 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 a warning letter

15. Based on our assessment of the breach, we have decided to issue Plan B with a warning letter rather than taking enforcement action under section 156B(1) at this time.
16. Our main reasons for deciding to issue Plan B with a warning are outlined below:
 - 16.1 2019/20 was the first year that Plan B was a new QLP and had reporting obligations under section 83;
 - 16.2 the final 2019/20 TDL LAD was not delayed because of Plan B's breach of section 83;
 - 16.3 Plan B's share of qualifying revenue for the 2019/20 TDL was only 0.14%, so even if its qualifying revenue changed significantly, it would not have had a material effect on other QLPs; and

¹² Whilst only a civil infringement notice or an application to the High Court for a civil pecuniary penalty are explicitly contemplated by section 156B, the Commission considers it may also take either of the other listed actions in response to a failure, without reasonable excuse, to comply with section 83.

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.

- 16.4 we estimate any commercial gain Plan B received from initially not obtaining an assurance or auditor's report to have been reversed, given that Plan B subsequently obtained an assurance report and came into compliance with section 83, albeit three months after the 22 September 2020 due date and following notification by the Commission of formal investigation and the potential enforcement outcomes.
- 17. These mitigating factors were balanced against consideration of the facts that:
 - 17.1 Plan B was informed of its obligations under section 83 and was on notice to provide the relevant information to the Commission by the 22 September 2020 due date;
 - 17.2 despite evidence showing that Plan B knew it was required to provide an assurance or auditor's report of its specified information, Plan B nevertheless did not provide either to the Commission by the due date and therefore knowingly breached section 83; and
 - 17.3 we consider there to be public interest to send a deterrence signal to Plan B as well as other parties to the TDL process, to deter them from failing to comply with section 83 in future years which may have significant consumer impacts.

Our expectations regarding Plan B's future compliance

- 18. We take non-compliance with section 83 and the requirements of the Act seriously. The failure to provide the specified information and audit/assurance information in line with the requirements 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 LAD process and the timely collection of the levy.
- 19. 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.
- 20. While we will not be taking any further action against Plan B at this time, we will take this warning into account if this conduct continues or if Plan B engages 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 Plan B.

Further information

- 21. This warning letter is public information and will be published on our website. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

22. Please contact Michael Callan at michael.callan@comcom.govt.nz if you have any questions about this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tristan Gilbertson', followed by a period.

Tristan Gilbertson
Telecommunications Commissioner