

ISPANZ Submission on Draft telecommunications development levy liability allocation determination for 1 July 2022 to 30 June 2023

Introduction

You have asked for submissions on the draft telecommunications development levy liability allocation determination for 1 July 2022 to 30 June 2023 (TDL LAD). You have excluded satellite operators from being Liable Persons under the Act and cite *Commerce Commission v Kordia*, CIV 2020-485-748 [2021] NZHC 2777 at [88]-[108] to support that. ISPANZ believes that your interpretation is incorrect for two reasons:

- *Commerce Commission v Kordia* was a judgement relating to a very specific and narrow set of circumstances. These circumstances do not apply to satellite telecommunications services of a type not referenced in the judgement and which did not exist at the time of that judgement.
- The parties to *Commerce Commission v Kordia* made a blanket assumption that outer space was not “in New Zealand”. In fact there is a body of international legal opinion that disagrees with that assumption.

This submission argues that the telecommunications service provided by Starlink is provided “in New Zealand” and that therefore Starlink should be included as a Liable Person in the TDL LAD.

Uplink and Downlink

At [107] *Commerce Commission v Kordia* states:

“the satellite operator might own assets in New Zealand that relate to the operation of the satellite (for example the uplink or downlink facilities) or other goods, services or equipment that support the operation of the satellite. If so, that may mean that the operator is providing its telecommunications services in New Zealand.”

Starlink has six gateways located in New Zealand.¹ Therefore the *Commerce Commission v Kordia* judgement supports our assertion that Starlink is a Liable Person.

When is Space “in New Zealand”

Starlink satellites’ orbits regularly cross vertically above New Zealand.² Under the Convention on International Civil Aviation (the Chicago Convention), each State has complete and exclusive sovereignty over the airspace above its territory.³ But at what height does that airspace sovereignty stop? This question is unsettled.⁴ At present, limitations of sovereignty cannot be presumed.⁵ It was therefore incorrect for the parties to *Commerce Commission v Kordia* to presume that space was not “in New Zealand”.

¹ <https://starlinkinsider.com/starlink-gateway-locations/>

² <https://starlink.co.nz/starlink-tracker-nz/>

³ <https://www.icao.int/ATConf.6/WP.080.1.en.pdf>

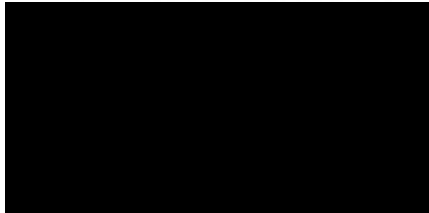
⁴ Dean N. Reinhardt, *The Vertical Limit of State Sovereignty*, 72 J. AIR L. & COM. 65 (2007)

⁵ *Security and Defence Quarterly* 2018;20(3):42–56

ISPANZ contends that at any time that a Starlink satellite is vertically above New Zealand, including above New Zealand's territorial waters, then that satellite is "in New Zealand" and that Starlink should therefore be a Liable Person under the Act.

Recommendation

It is recommended that Starlink be included as a Liable Person in the TDL LAD.



David Haynes

ISPANZ Chief Executive

9th November 2023