

19 May 2023

[REDACTED]  
Feenix Communications Limited  
Flat 10/Shed 23, 145 Quay Street  
Auckland Central 1010

Dear [REDACTED]

## Warning - Section 83 of the Telecommunications Act 2001

### Purpose

1. The Commerce Commission (**Commission**) has been investigating Feenix Communications Limited (**Feenix**) under the Telecommunications Act 2001 (**Act**). We have now completed our investigation and are writing to inform you of our views.
2. The Commission considers Feenix is likely to have breached section 83 of the Act for failing to produce information required in relation to the 2021/22 Telecommunications Development Levy Liability Allocation Determination (**liability allocation determination**) in the timeframe required.
3. Compliance with section 83 is important because the regulatory scheme established under Part 3 of the Act 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 Qualifying Liable Persons (**QLPs**).
4. In this instance the Commission has decided to issue Feenix with a warning in respect of its failure to provide us with audit/assurance information by 20 September 2022 in accordance with section 83, without a reasonable excuse. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred.

### Specified information and assurance required for the liability allocation determination

5. Section 83(1) requires each QLP to supply us with:

- 5.1 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>1</sup> and
  - 5.2 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>2</sup>
6. On 30 June 2022 we provided QLPs with instructions regarding the specified information we required under section 83(1)(a) (**specified information**),<sup>3</sup> and the audit report or alternative assurance information (**audit/assurance information**) required under section 83(1)(b), from all QLPs for the 2021/2022 financial year. These instructions noted that QLPs were required to provide this information to the Commission by 20 September 2022.
  7. Feenix was a QLP for the 2021/22 Telecommunications Development Levy (**TDL**) and was therefore required to provide us with specified information and audit/assurance information by 20 September 2022.
  8. Feenix did not provide the audit/assurance information by 20 September 2022. Feenix provided unaudited accounts on 16 September and audited accounts with assurance information on 28 November. There were no changes to the original information Feenix provided post-audit.

### **Likely breach of section 83**

9. Feenix failed to comply with section 83 as it did not provide the Commission with the specified information alongside audit/assurance information by 20 September 2022, as required.
10. Feenix accepted full responsibility for its failure to arrange an audit with sufficient time to meet the 20 September deadline, noting that as the 2021/22 TDL year was its first year as a QLP it was unfamiliar with TDL obligations, but had been provided the information it needed to comply.
11. The Commission may take enforcement action under section 156B of the Act for a breach under section 156A(1)(k), where a QLP fails without reasonable excuse, to provide the specified information and assurance reports required under section 83.
12. In our view, Feenix was provided sufficient information and time to meet its TDL obligations. As a new QLP, the Commission also met with Feenix to confirm its obligations, and explain the operation of the TDL process.

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

<sup>2</sup> Section 83(1)(b)

<sup>3</sup> There was no prescribed information required under 83(1)(a) for the 2021/2022 financial year.

13. Our conclusion is that Feenix is unlikely to have a reasonable excuse for its failure 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; or
  - 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 Feenix 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>4</sup>
18. The Commission's enforcement criteria are:
  - 18.1 extent of detriment;
  - 18.2 seriousness of conduct; and
  - 18.3 public interest.
19. In exercising our enforcement discretion, we have considered the following factors under our enforcement criteria:
  - 19.1 there was little detriment caused by Feenix's failure to submit audited accounts by 20 September 2022. The unaudited financial information it provided on 16 September 2022 was used by the Commission to develop the draft liability allocation determination, and these figures did not change post-audit.

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<sup>4</sup> Further detail regarding our enforcement criteria can be found in our Enforcement Response Guidelines [here](#).

- 19.2 the circumstances leading to Feenix's non-compliance, while foreseeable and within its control are not expected to arise again. Feenix now understands its obligations under the TDL, and the way the TDL process operates.
- 19.3 there is limited public interest in the Commission taking stronger action against Feenix for its non-compliance.

**Our expectations regarding Feenix's future compliance**

- 20. We take non-compliance with section 83 and the requirements of the Telecommunications Act seriously.
- 21. 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.
- 22. 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.
- 23. While we will not be taking any further action against Feenix at this time, we will take this warning into account if this issue arises again, or if Feenix 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 Feenix.

**Further information**

- 24. This warning letter is public information and will be published on our website.
- 25. Please contact Zeb Walker, Principal Investigator on [REDACTED] or [REDACTED] if you have any questions about this letter.

Yours sincerely

[REDACTED]

Tristan Gilbertson  
Telecommunications Commissioner