

2020/21 Telecommunications Development Levy

Supplementary section 83 guidance for broadcasting QLPs

30 June 2021



Introduction

The purpose of this document

1. The 2020/21 Telecommunications Development Levy (**TDL**) year is the first year when broadcasting transmission revenue can be qualified revenue. As such the 2020/21 TDL process differs from previous years.
2. This document provides supplementary guidance to broadcasters who must provide specified information and assurance to the Commerce Commission (**Commission**) under s 83 of Telecommunications Act 2001 (the **Act**) for the 2020/21 TDL process.

Introduction note

3. This document must be read alongside the *Information that qualifying liable persons must provide to the Commission under section 83 of the Telecommunications Act 2001 (Specified Information Document)*, which can be downloaded from the [2020/21 TDL project page](#).
4. Please contact regulation.branch@comcom.govt.nz (CC'ing aidan.winder-speed@comcom.govt.nz) if you have:
 - 4.1 any feedback on the workability of the guidance provided in this document;
 - 4.2 questions about the information contained in this document; or
 - 4.3 questions on the TDL more generally.
5. We may revise this document on the basis of the High Court's opinion on the case stated (discussed below) and any feedback we receive from stakeholders. Should we decide to revise this document, we will contact stakeholders to let them know the timeframe and when a revised version will be available.

Case stated

6. In December 2020, the Commission filed a case stated to the High Court under s 100A of the Commerce Act 1986. The case stated was heard in the High Court on 12 April 2021. The case stated seeks an opinion on questions of statutory interpretation of broadcasting-related TDL provisions following the relevant provisions of the Telecommunications (New Regulatory Framework) Amendment Act 2018 (**Amendment Act**) coming into force. An opinion from the High Court is expected in the near future.
7. While the opinion for the case is pending we expect parties to comply with the s 82 and s 83 information provision requirements if they meet definition of a qualifying liable person (**QLP**). A person that does not provide information under s 82 and s 83 because they disagree with the Commission's positions in the case stated bears the risk that they are found to have breached s 82 and s 83.

8. We may revisit this supplementary guidance once the case stated opinion is released.

Broadcasting changes

9. The relevant parts of the Amendment Act came into force on 13 November 2018. The Amendment Act, among other things, removed the exclusion of broadcasting from the definition of “telecommunication” in s 5 of the Act. The definition of “telecommunication” is now:

telecommunication means the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not.

10. Broadcasting transmission may therefore be included within the definition of “telecommunication”, provided the particular means of broadcasting transmission falls within the definition of “telecommunication”. It follows that revenue earned from the provision of broadcasting transmission services is relevant to:

10.1 determining whether a person is a QLP; and

10.2 determining a QLP’s qualified revenue.

11. The Amendment Act also inserted s 85A, a TDL-specific section which provides for the exclusion of certain types of broadcasting services revenue from the calculation of qualified revenue for the purposes of the TDL.

(1) For the purposes of this subpart, the amount of a liable person’s qualified revenue must exclude the following amounts (as determined in accordance with any specifications set by the Commission):

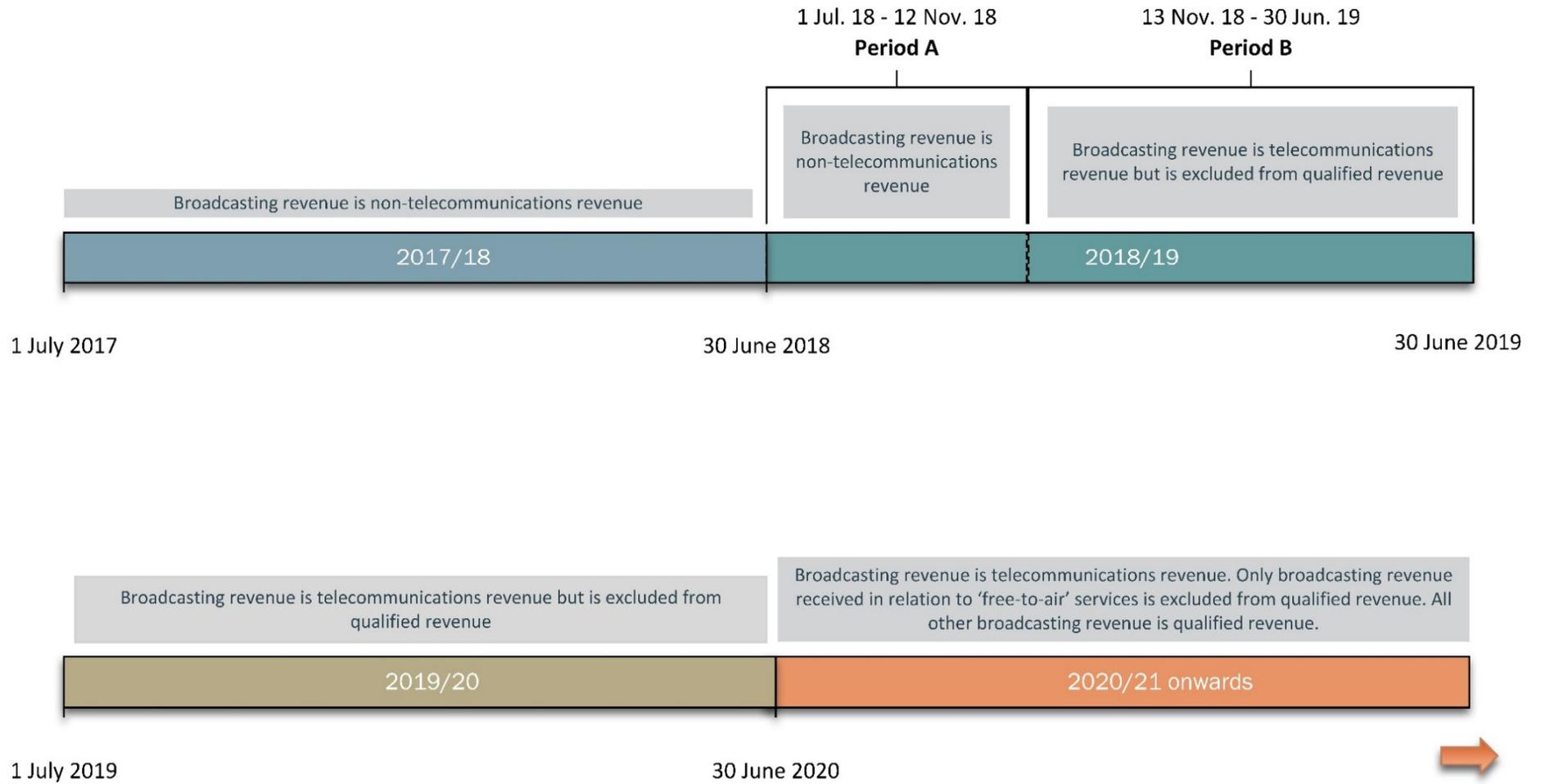
(a) any amount of revenue that is received by a liable person in relation to a broadcasting service that is supplied to end-users free of charge (for example, revenue derived from a free-to-air radio or television service);

(b) any amount of revenue that is received before 1 July 2020 by a liable person in relation to any other broadcasting service.

(2) The specifications set by the Commission may (without limitation) provide for the apportionment of any amount of revenue if the amount is received in connection with a service referred to in subsection (1) and 1 or more other services.

12. It follows that the Amendment Act has affected the treatment of broadcasting revenue since the 2018/2019 TDL. However, as show in Figure 1 below, the 2020/21 TDL is the first year when broadcasting transmission revenue can be qualified revenue.

Figure 1: Treatment of broadcasting revenue



Section 85A

Section 85A(1)

13. Section 85A(1) provides for two types of exclusions from qualified revenue for broadcasting services.
14. The term “broadcasting” is defined in the Act by reference to the Broadcasting Act 1989:¹

broadcasting means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes—

- (a) made on the demand of a particular person for reception only by that person; or
 - (b) made solely for performance or display in a public place
15. Subsection (1)(b) of s 85A is a transitional provision which excluded all broadcasting services revenue received before 1 July 2020 from qualified revenue. As the 2020/21 TDL year is 1 July 2020 to 30 June 2021, subsection (1)(b) does not apply this year, ie, broadcasting transmission can be qualified revenue this year.
 16. Subsection (1)(a) of s 85A excludes from qualified revenue any amount of revenue that is received in relation to a broadcasting service that is supplied to end-users free of charge. Unlike subsection (1)(b), subsection (1)(a) applies this year and in all future years.

What is excluded from qualified revenue under s 85(1)(a)

17. A liable person may deduct revenue from their qualified revenue if that revenue is received by the person for supplying telecommunication services as part of a broadcasting service which it supplies to end-users free of charge.
18. Where a liable person provides telecommunications services for a fee to a free-to-air broadcaster, the revenue earned by the liable person is earned in relation to a service provided to the broadcaster for a fee and so does not fall within the exclusion provided for in s 85A(1)(a). For example, where a person supplies broadcasting transmission services to a free-to-air broadcaster for a fee, and that broadcaster uses those transmission services to broadcast its programmes to end-users free of charge, the revenue that the person receives is in relation to a service provided by the person to the broadcaster for a fee, not in relation to a broadcast service provided to end-users free of charge.

Section 85A(2)

19. QLPs should refer to the general guidance provided in the Specified Information Document on the apportionment of bundles of liable and non-liable revenue.

¹ Broadcasting is defined in section 5 of the Act by reference to section 2(1) of the Broadcasting Act 1989.

20. We are interested to hear from stakeholders if there are any unique difficulties in apportioning revenue for the purpose of s 85A.

Treatment of revenue received for the supply of broadcasting transmission services via satellites

21. Like revenue received from supplying broadband and voice services via a satellite network, revenue received from supplying a broadcast transmission service via a satellite network is qualified revenue.
22. Where a satellite is transmitting signals directed to, and intended for receipt by, end-users in New Zealand, the satellite operator is providing a telecommunications service in New Zealand for the purposes of the Telecommunications Act.
23. QLPs may deduct payments made to other QLPs for the supply of telecommunication services in New Zealand via a satellite.²

Guidance on common broadcasting revenue streams

On-demand content

24. The Commission considers that both music on-demand and video on-demand content revenue is not captured as a telecommunications service as it can be distinguished from the conveyance revenue which is the intended focus of the definition of telecommunications services.
25. As such content revenue is non-telecommunications revenue and conveyance revenue is qualified revenue.
26. If on-demand content is sold as part of a bundle with telecommunications services QLPs should allocate the revenue in accordance with NZ IFRS 15.³

Broadcasting subscription revenue

27. Subscription revenue is earned from both the transmission of the content and the content of the broadcast. The revenue associated with the transmission of the content is telecommunications revenue and the revenue associated with the content element is non-telecommunications revenue.
28. If a QLP is unable to allocate subscription revenue between the content and the transmission elements using IFRS 15 then they may instead use the apportionment methodology outlined below.

² So long as the telecommunications services are used in the supply of telecommunications services to its customers.

³ See #7 from Attachment A of the Specified Information Document.

Table 1: Apportionment methodology for broadcasting subscription revenue⁴

| Step | Item | Value | Formula |
|------|---|-------|--------------------------|
| a | Broadcasting subscription revenue | \$a | |
| b | Normalised EBITDA | \$b | |
| c | Normalised EBITDA / Broadcasting subscription revenue | c% | $c\% = b / a$ |
| d | Transmission costs | \$d | |
| e | Broadcasting subscription revenue – Transmission element | \$e | $e = d \times (1 - c\%)$ |
| f | Broadcasting subscription revenue – Content element | \$f | $f = a - e$ |

29. The apportionment methodology outlined in Table 1 above and described further below allows QLPs to calculate the “content element” of their broadcasting subscription revenue. The QLP then uses this content element value as a “non-telecommunications service revenue” deduction from their operating revenue in Template 1 of their information disclosure.
30. The QLP must retain records of this calculation and name the line item “Broadcasting subscription revenue – content element” in their Template 1 disclosure.

Step (a)

31. The QLP should include in step (a) all broadcasting subscription revenue that needs apportioning between transmission and content for the 2020/21 TDL year.
32. For the avoidance of doubt revenue received from residential subscribers, corporate subscribers and resale partners should be treated the same.

Step (b)

33. In step (b), the QLP uses their normalised EBITDA from their 2020/21 financial statements.
34. For the purpose of these instructions normalised EBITDA means EBITDA which has been adjusted (where necessary) to exclude one-off items such as impairment of assets.

Step (c)

35. In step (c), the QLP divides their normalised EBITDA by their broadcasting subscription revenue.

⁴ This apportionment methodology should only be used in instances where content and transmission are not sold separately and individual revenue items cannot be obtained.

Step (d)

36. The QLP should include in step (d) all broadcasting transmission costs incurred whilst earning the revenue listed in step (a).
37. For the purpose of step (d) broadcasting transmission costs include all costs that are attributable to broadcasting transmission such as transmission and linking costs, costs of service and monitoring equipment at subscribers' premises and installation costs.

Step (e)

38. In step (e) the transmission element of the QLP's broadcasting subscription revenue is calculated by multiplying transmissions costs (step d) by one minus step (c).

Step (f)

39. In step (f) the QLP calculates the content element of their broadcasting subscription revenue by deducting the transmission element (step e) from their broadcasting subscription revenue (step a).

Advertising and sponsorship revenue

40. Subject to s 85A(1)(a), all revenue received in relation to broadcast transmission is telecommunications revenue. This includes advertising and sponsorship revenue that is received in relation to broadcasting transmission.
41. As with broadcasting subscription revenue, it is likely that advertising and sponsorship revenue is received in relation to broadcasting transmission and the content that is being transmitted. Only the revenue received in relation to broadcasting transmission is telecommunications revenue.
42. QLPs should use the apportionment methodology described in broadcasting subscription revenue section above to apportion revenue between the content and transmission elements. This will require the QLP to use total advertising, and sponsorship revenue in step (a) to calculate a deduction for "Advertising and sponsorship revenue – content element" in Template 1 of their information disclosure.

Colocation

43. Revenue earned from co-location on broadcasting transmission sites or co-location of equipment in the PTN environment is captured and considered telecommunications revenue as it is earned from the use of those facilities as part of a PTN.
44. This is equivalent to the treatment of co-location for other telecommunication services.

End-user equipment

45. Revenue from selling or renting customer premises equipment is revenue from goods that are not considered to be related to a PTN and therefore not telecommunications revenue. For example, revenue from the sale of Freeview receivers is not qualified revenue, as a Freeview receiver is on the private side of the network demarcation point and therefore not a component of a PTN.