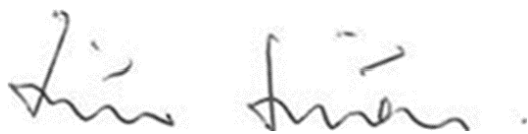


# **Final telecommunications development levy liability allocation determination for 1 July 2020 to 30 June 2021 [2021] NZCC 28**

Under sections 87 and 88 of the Telecommunications Act 2001

**The Commission:** Tristan Gilbertson  
Elisabeth Welson  
John Crawford  
Dr John Small

**Date of final determination:** 14 December 2021



Tristan Gilbertson, Telecommunications Commissioner

Dated at Wellington this 14<sup>th</sup> day of December 2021

COMMERCE COMMISSION

Wellington, New Zealand



**Associated documents**

Publication date	Title
30 June 2021	<a href="#">2020/21 TDL specified information document</a>
30 June 2021	<a href="#">Specified information templates for 2020/21</a>
30 June 2021	<a href="#">Supplementary section 83 guidance for broadcasting QLPs</a>
09 November 2021	<a href="#">Draft telecommunications development levy liability allocation determination for 1 July 2020 to 30 June 2021</a>

## Glossary, defined terms and abbreviations

2018 Amendment Act	Telecommunications (New Regulatory Framework) Amendment Act 2018
Act	Telecommunications Act 2001
Commission	Commerce Commission
CPI	Consumer price index
Interconnected bodies corporate	A body corporate that was connected to a liable person via one of the criteria set out in s 79(1) that earned qualified revenue, even where such body corporate was not itself a liable person
LAD	Liability allocation determination
Liable person	A person who provides a telecommunications service in New Zealand by means of some component of a PTN that is operated by the person
NZ IFRS 15	New Zealand Equivalent to International Financial Reporting Standard 15 Revenue from Contracts with Customers
PTN	Public telecommunications network - a network used, or intended to be used, in whole or in part, by the public for the purpose of telecommunication
QLP	Qualifying liable person - a liable person that traded in the 2019/20 financial year and, together with all bodies corporate connected via s 79, met the minimum telecommunications revenue threshold in that financial year
Qualified revenue	Revenue determined by the Commission that is used to assess the amount of the TDL that a liable person must pay
Specified information	Information requested by the instructions we issued on 30 June 2021
TDL	Telecommunications Development Levy
TDL year	The period from 1 July to 30 June for which a TDL liability allocation determination is being made
Telecommunication	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
Telecommunications services	Any goods, services, equipment, and facilities that enable or facilitate telecommunication

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## Executive summary

1. This is the final liability allocation determination (**LAD**) for the 2020/21 Telecommunications Development Levy (**TDL**) year of 1 July 2020 to 30 June 2021, required by s 87 of the Telecommunications Act 2001 (the **Act**). It allocates the amount each qualifying liable person (**QLP**) is required to pay as their share of the \$10,145,348.84 2020/21 TDL.
2. The TDL is an annual levy that the Government uses to pay for improvements to New Zealand's telecommunications infrastructure, including the relay service for the deaf and hearing-impaired, broadband for rural areas, and improvements to the 111 emergency service.
3. This year is the first that companies involved in broadcasting transmission may be liable to pay the TDL, following amendments to the Act in 2018. Sky Network Television Ltd is a new QLP this year, as a result.
4. There are also three other new QLPs for this year, as a result of changes in the market: Devoli group, Inspire Net group, and Todd Corporation group.
5. Table 1 below sets out each QLP's qualified revenue and their allocation of the 2020/21 TDL, based on the formula in s 85(1)(b) of the Act.<sup>1</sup>

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<sup>1</sup> The formula is set out in para 47 of this final LAD.

**Table 1: Levy allocation**

QLP <sup>†</sup>	Qualified revenue (\$)*	% of industry qualified revenue	Amount of TDL to pay (\$)
Spark group	\$1,430,636,941	32.86%	\$3,333,873.57
Vodafone New Zealand Ltd <sup>^</sup>	\$1,107,723,000	25.44%	\$2,581,373.60
Chorus group	\$879,307,036	20.20%	\$2,049,086.25
Two Degrees group	\$412,644,000	9.48%	\$961,601.71
Orcon group	\$129,398,834	2.97%	\$301,543.56
Tuatahi First Fibre Ltd**	\$96,537,000	2.22%	\$224,964.24
Enable Services Ltd**	\$79,968,000	1.84%	\$186,352.80
Sky Network Television Ltd	\$35,727,700	0.82%	\$83,257.77
Trustpower Ltd <sup>^</sup>	\$33,572,100	0.77%	\$78,234.48
Kordia Ltd**	\$33,101,000	0.76%	\$77,136.66
Vital group	\$16,559,015	0.38%	\$38,588.17
Vector Communications Ltd	\$16,046,000	0.37%	\$37,392.67
Northpower Fibre Ltd **	\$12,785,000	0.29%	\$29,793.42
Lightwire Ltd	\$12,487,132	0.29%	\$29,099.29
Devoli group	\$10,125,271	0.23%	\$23,595.35
Now New Zealand Ltd	\$9,411,000	0.22%	\$21,930.85
Voyager group	\$9,179,668	0.21%	\$21,391.77
Inspire Net group	\$8,554,987	0.20%	\$19,936.05
MyRepublic Ltd	\$8,195,000	0.19%	\$19,097.15
Plan B group	\$6,107,189	0.14%	\$14,231.84
Todd Corporation group	\$3,121,781	0.07%	\$7,274.82
Transpower New Zealand Ltd**	\$2,400,000	0.06%	\$5,592.82
<b>Total Industry</b>	<b>\$4,353,587,654</b>	<b>100.00%</b>	<b>\$10,145,348.84</b>

† Any reference to a group (eg, Spark group) is a reference to a group of bodies corporate that, for the purposes of the TDL, are treated as one person under s 79 of the Act. See Attachment A for a full list of bodies corporate that comprise each QLP group.

\* A firm with telecommunications revenue over the \$10m minimum telecommunications revenue threshold for inclusion may have a reported qualified revenue of under \$10m due to adjustments.

\*\* Section 79 of the Act requires us to treat these Crown companies as one QLP when assessing who is required to contribute to the TDL, including whether their combined qualified revenue exceeds the \$10m telecommunications revenue threshold. However, they provided separate disclosures, so their TDL allocations are shown separately.

<sup>^</sup> Section 79 of the Act requires us to treat these majority Infratil owned companies (Vodafone and Trustpower) as one QLP when assessing who is required to contribute to the TDL, including whether their combined qualified revenue exceeds the \$10m telecommunications revenue threshold. However, they provided separate disclosures, so their TDL allocations are shown separately.

Note: UltraFast Fibre Limited changed its name to Tuatahi First Fibre Limited on 1 November 2021, and Vocus group has rebranded to Orcon group

## Introduction

6. The TDL is an annual levy that the Government uses to pay for improvements to New Zealand’s telecommunications infrastructure, including the relay service for the deaf and hearing-impaired, broadband for rural areas, and improvements to the 111 emergency service.
7. Subpart 2 of Part 3 of the Act prescribes an annual procedure for the Commerce Commission (**Commission**) to determine the amount of the TDL payable by each QLP.
8. This document is the final LAD for the period 1 July 2020 to 30 June 2021. It sets our final allocation of the amount each QLP is required to pay of the 2020/21 TDL of \$10,145,348.84.<sup>2</sup>

## Structure of this document

9. This final LAD sets out:
  - 9.1 The legal framework for this LAD;
  - 9.2 Our methodology and reasoning, including:
    - 9.2.1 how we identified QLPs for the 2020/21 TDL process;
    - 9.2.2 the approach used to calculate qualified revenue; and
    - 9.2.3 the compliance and assurance process;
  - 9.3 Our final allocation of the TDL between the QLPs.
10. Attached to this final LAD is the list of 2020/21 TDL QLPs, including a full list of the bodies corporate included in each QLP group. A QLP group is a group of bodies corporate that are treated as one person under s 79 of the Act, for the purposes of the TDL.

## Our process

11. Our specified instructions (including new supplementary guidance for broadcasting QLPs) were published on 30 June 2021.
12. All QLPs were required to provide specified information and an assurance report to the Commission by 22 September 2021.
13. We issued our draft LAD on 9 November 2021 and received one submission from Kordia Ltd (**Kordia**).<sup>3</sup>

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<sup>2</sup> See paras 45-46 for the calculation of this figure.

<sup>3</sup> Kordia “Submission on TDL draft determination – 23 November 2021” accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/272138/Kordia-Submission-on-TDL-draft-determination-23-November-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/272138/Kordia-Submission-on-TDL-draft-determination-23-November-2021.pdf)

## Legal framework

### Legislative background

14. The TDL was established under the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011.
15. Later amendments to the Act have altered the TDL's process and scope. Most recently, the Telecommunications (New Regulatory Framework) Amendment Act 2018 (**2018 Amendment Act**) removed the exclusion of "broadcasting" from the definition of "telecommunication" in s 5 of the Act. The Amendment Act also introduced s 85A, which excludes free-to-air broadcast services revenue from qualified revenue.
16. In December 2020, the Commission filed a case stated under s 100A of the Commerce Act 1986 asking for the High Court's opinion in relation to the above amendments. The judgment, which was issued on 15 October 2021,<sup>4</sup> and its implications for this year's TDL is discussed further below.

### Commission's role

17. Subpart 2 of Part 3 of the Act requires the Commission to make a TDL LAD on an annual basis. A TDL year is the financial year of 1 July to 30 June.<sup>5</sup>
18. The Act requires the Commission to prepare a draft LAD, invite submissions on the LAD and then publish a final LAD.<sup>6</sup>
19. We are required to make reasonable efforts to publish a draft LAD no later than 80 working days after the end of a TDL year, which is in mid-October each year.<sup>7</sup> A draft LAD must include:<sup>8</sup>
  - 19.1 the amount of each QLP's qualified revenue;
  - 19.2 the amount of TDL payable by each QLP;<sup>9</sup>
  - 19.3 the methodology applied by the Commission in preparing the determination; and
  - 19.4 the reasons for the determination.

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<sup>4</sup> *Commerce Commission v Kordia Group Ltd & Ors* [2021] NZHC 2777 (*Commerce Commission v Kordia*) A copy of the judgment is available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/268453/Commerce-Commission-v-Kordia-Group-Ltd-and-others-15-October-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/268453/Commerce-Commission-v-Kordia-Group-Ltd-and-others-15-October-2021.pdf)

<sup>5</sup> "Financial year" is defined in s 5 of the Act as meaning "a period of 12 months beginning on 1 July in any year and ending on 30 June in the following year". The "financial year" (for which the levy must be paid) is referred to as 'financial year A' in s 81.

<sup>6</sup> Section 84 and 87 of the Act.

<sup>7</sup> Section 84(2) of the Act.

<sup>8</sup> Section 85 of the Act.

<sup>9</sup> Calculated in accordance with the formula set out in s 85(1)(b) of the Act.



20. The Act provides that the closing date for submissions on the draft LAD cannot be more than 20 working days after the date that we give public notice of the draft LAD.<sup>10</sup>
21. The final LAD has the same content requirements as the draft LAD and we are required to make reasonable efforts to publish the final LAD no later than 20 working days after the closing date for submissions on the draft LAD, which would usually be mid-December.<sup>11</sup>

### **Liable person**

22. A liable person is defined in s 5 of the Act as a person who provides a telecommunications service in New Zealand by means of operating some component of a Public Telecommunications Network (**PTN**).<sup>12</sup> A PTN is a network used, or intended to be used, in whole or in part, by the public for the purpose of telecommunication.<sup>13</sup>

#### *A broadcasting transmission network is a PTN*

23. The 2018 amendment to the Act to remove the “broadcasting” exclusion from the definition of “telecommunication” has had the effect of broadening the scope of who may be a liable person.
24. Prior to the amendment, broadcasting transmission networks were excluded from the scope of PTN because broadcasting was not within the definition of telecommunication. Similarly, a person who provided a broadcasting transmission service was not providing a “telecommunication service”.
25. The amendment means that a person who provides a broadcasting transmission service in New Zealand by means of operating some component of a broadcasting transmission network is a liable person.
26. This interpretation was confirmed by the High Court in the TDL case stated judgment, *Commerce Commission v Kordia*.<sup>14</sup> In that case, the Court was essentially asked whether a broadcasting transmission network is a PTN.
27. This was a live issue because the respondents to the case stated had submitted that a broadcasting transmission network is not a PTN. Respondents argued that a broadcasting transmission network cannot be used by the public for the purpose of

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<sup>10</sup> Section 84(1)(c) of the Act.

<sup>11</sup> Section 88 and 87(2) of the Act.

<sup>12</sup> Our interpretation of a PTN in light of the *REANNZ v Commerce Commission* judgment can be found at paragraphs 19-24 of “Final 2019/20 TDL liability allocation determination” accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/229327/Final-2019-20-TDL-liability-allocation-determination-3-December-2020.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/229327/Final-2019-20-TDL-liability-allocation-determination-3-December-2020.pdf).

<sup>13</sup> Section 5 of the Act.

<sup>14</sup> *Commerce Commission v Kordia*, at [57]-[87].

telecommunication as the public cannot use such a network to send a telecommunication, only to receive.<sup>15</sup>

28. The Court held that a broadcasting transmission network is a PTN. It found that the public uses a network for the purposes of telecommunication “if they have a device that receives the telecommunication conveyed and are able to avail themselves of the telecommunication received”.<sup>16</sup> This is the case with broadcasting transmission networks, since the public uses a device to receive and avail themselves of a broadcast transmission.

*Telecommunications service “in New Zealand”*

29. To be a liable person a person must be providing a telecommunications service “in New Zealand”.
30. As part of the TDL case stated, the Court was asked whether the operator of a satellite, which is positioned outside New Zealand but transmitting signals for receipt by end-users in New Zealand, is providing a telecommunications service in New Zealand.<sup>17</sup>
31. In our draft TDL LAD, we noted that:<sup>18</sup>

The Court held that, in those circumstances, the satellite operator is not providing a telecommunications service in New Zealand. The Court noted that, in relation to satellite transmission to New Zealand end-users, the service provided in New Zealand is the service enabled by New Zealand-based uplink and downlink facilities. The Court held that, while the satellite operator facilitates that New Zealand telecommunications service, the facilitation – and therefore the service – occurs outside of New Zealand.

32. In response, Kordia submitted that:<sup>19</sup>

The Court did not make any declaration on whether the uplink services provided by Kordia and Sky are subject to the levy. In fact, this question was not traversed in the case, despite Kordia seeking to have it added to the case-stated. Kordia submits that the uplink service and the downlink service are not telecommunications services in New Zealand. They are part of a network system. Among other things, it would be incongruous if the key component of that network, the satellite, was outside the scope of the Act, but the transmissions to and from the satellite were deemed to be within the ambit of the Act.

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<sup>15</sup> *Commerce Commission v Kordia*, at [64]-[69].

<sup>16</sup> *Commerce Commission v Kordia*, at [73].

<sup>17</sup> *Commerce Commission v Kordia*, at [88]-[108]. We have clarified the issue that the Court considered following Kordia’s submission on our draft TDL LAD (see Kordia “Submission on draft TDL LAD” (23 November 2021).

<sup>18</sup> Draft 2020/21 TDL LAD, para 33. Accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0035/269819/Draft-2020-21-TDL-liability-allocation-determination-9-November-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0035/269819/Draft-2020-21-TDL-liability-allocation-determination-9-November-2021.pdf).

<sup>19</sup> Kordia “Submission on draft TDL LAD” (23 November 2021).

33. We quote the relevant part of the Court’s judgment here in full:<sup>20</sup>

[105] I accept Optus’ submission that the transponder capacity service is one provided in space that has a consequence in New Zealand. That consequence is enabled by the uplink and downlink facilities that Optus (as the only party to whom this question is presently addressed) does not own or operate. **While Optus through its transponder capacity service facilitates the transmission of a New Zealand telecommunication service, that facilitation occurs outside of New Zealand (through an asset owned and operated by a party outside of New Zealand). Without the New Zealand component of the uplink and downlink the signal that leaves the satellite is of no consequence. The New Zealand component of the telecommunications service is provided by the New Zealand broadcasters (Kordia and Sky at present).** They contract with Optus for a service in space that facilitates the service they provide. The consequence of Optus’ service in space is that Kordia and Sky are able to deliver content to end-users in New Zealand. [emphasis added].

34. We acknowledge that the Court was not asked to directly answer the question of whether uplink and downlink services are telecommunications services provided “in New Zealand”. However, its reasoning is nonetheless persuasive and we are of the view that uplink and downlink services – which are provided by means of assets that are located within New Zealand that facilitate the transmission of signals – are telecommunications services provided “in New Zealand”.

### Qualifying liable persons

35. Only liable persons who Subpart 2 of Part 3 of the Act applies to are liable to pay the TDL. We refer to these liable persons as “qualifying liable persons” or QLPs.
36. A liable person meets the 2020/21 TDL QLP criteria if they:
- 36.1 traded in the 2019/20 financial year;<sup>21</sup> and
  - 36.2 earned at least \$10 million gross telecommunications services revenue in the 2019/20 financial year by means of its PTN or by means that rely primarily on the existence of its or any other PTN, including such revenue of any interconnected bodies corporate.<sup>22</sup>

### Qualified revenue

37. Qualified revenue is defined in s 5 of the Act as the revenue a liable person receives during a financial year for supplying either or both:
- 37.1 telecommunications services by means of its PTN; and/or
  - 37.2 telecommunications services by means that rely primarily on the existence of its PTN or any other PTN.

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<sup>20</sup> *Commerce Commission v Kordia*, at [105].

<sup>21</sup> Section 81(1)(a) of the Act.

<sup>22</sup> Section 81(1)(b) and section 79 of the Act.

38. Section 85(2) of the Act allows the Commission to determine what revenue basis to use in calculation of qualified revenue.<sup>23</sup>
39. The 2018 amendments to the Act mean that, subject to the exclusion discussed below, qualified revenue includes revenue from supplying telecommunications services by means of a broadcasting transmission network, or by means that rely primarily on the existence of a broadcasting transmission network or any other broadcasting transmission network.
40. Section 85A(1)(a) of the Act specifically excludes from qualified revenue “any amount of revenue received 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)”.
41. The scope of the exclusion in s 85A(1)(a) was also the subject of the TDL case stated.<sup>24</sup> The Court found that revenue from broadcasting transmission services supplied to a free-to-air broadcaster, which the broadcaster then uses to broadcast its content to end-users free of charge, falls within the s 85A(1)(a) exclusion.

#### **Requirements on qualifying liable persons**

42. Section 82 of the Act required each QLP to provide the Commission with a copy of its financial statements for the 2019/20 financial year by 6 April 2021.<sup>25</sup>
43. Section 83 of the Act required each QLP to provide the Commission, by 22 September 2021, with specified information for the 2020/21 financial year and either:<sup>26</sup>
- 43.1 an assurance report on its specified information; or
- 43.2 an alternative form of assurance specified by the Commission.<sup>27</sup>
44. QLPs are required under s 89 of the Act to pay the Crown the amount set out in our final LAD no later than 20 working days after the public notification of the final LAD.

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<sup>23</sup> See paragraph 63 for details on the revenue basis used.

<sup>24</sup> *Commerce Commission v Kordia*, at [109]-[130].

<sup>25</sup> QLPs from last year were not expected to provide their 2019/20 financial statements as this was already provided as part of their 2019/20 s 83 disclosures.

<sup>26</sup> The Commission specified the information required from QLPs in its 2020/21 specified information document, accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/258253/2020-21-TDL-specified-information-document-30-June-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/258253/2020-21-TDL-specified-information-document-30-June-2021.pdf)

<sup>27</sup> The Commission specified two alternative forms of assurance for the 2020/21 TDL year— alternative option A and B. These are set out in paras 69 to 72 of the 2020/21 specified information document.

**Total levy**

45. The total TDL levy amount is set out in Schedule 3B of the Act. For the 2020/21 TDL year, the Act provides that the levy be calculated according to the following formula:

$$\frac{a}{b} \times c$$

Where:

- a is the CPI index number for quarter two 2020
- b is the CPI index number for quarter two 2019
- c is the total TDL levy for the 2019/20 TDL

46. It follows the total 2020/21 TDL levy is:

$$\frac{1047}{1032} \times \$10,000,000 = \$10,145,348.84$$

**Levy allocation formula**

47. Section 85(1)(b) of the Act prescribes that the amount of TDL payable by each QLP be calculated in accordance with the following formula:

$$\frac{a}{b} \times c$$

Where:

- a is the amount of the QLP's qualified revenue
- b is the sum of all QLP's qualified revenue
- c is the TDL levy specified for the relevant year in Schedule 3B.<sup>28</sup>

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<sup>28</sup> For the 2020/21 TDL, c is equal to \$10,145,349. See paragraphs 45-46 for the calculation.

## Methodology and reasons

### Identifying QLPs for the 2020/21 TDL process

48. For the 2020/21 TDL process, we reviewed information provided by QLPs as part of their 2019/20 s 83 disclosures as well as information provided under s 82 of the Act by other liable persons.
49. Attachment A lists the firms that we have identified as being QLPs for the purposes of the 2020/21 TDL process. This list of QLPs did not change between our draft LAD and final LAD.
50. This list differs from the 2019/20 LAD as it reflects changes in the New Zealand market and the relevant provisions of the 2018 Amendment Act coming into force.
- 50.1 Sky Network Television Ltd is a new QLP as a result of the 2018 broadcasting-related amendments to the Act;
- 50.2 There are three other new QLPs, reflecting changes in the market:
- 50.2.1 Devoli group;
- 50.2.2 Inspire Net group; and
- 50.2.3 Todd Corporation group.
- 50.3 Now New Zealand Ltd is now an independent QLP following Spark group's divestment in the company.
51. The Optus group was listed as a QLP in our specified instructions.<sup>29</sup> Following the TDL case stated judgment, and in particular the Court's answer to the satellite-related question, we do not consider that Optus group is a QLP.
52. Radio New Zealand Ltd was listed as a QLP in our specified instructions. Following the TDL case stated judgment, in particular the Court's answer to the s 85A related question, we do not consider that Radio New Zealand Ltd is a QLP.

### Approach to calculating qualified revenue<sup>30</sup>

53. On 30 June 2021 we published our 2020/21 specified information document which specified the financial information and assurance that QLPs must provide to us under s 83 of the Act. On the same day, QLPs were notified about these documents and sent an email containing a link to our website where the documents could be found.

<sup>29</sup> 2020/21 specified information document, accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/258253/2020-21-TDL-specified-information-document-30-June-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/258253/2020-21-TDL-specified-information-document-30-June-2021.pdf)

<sup>30</sup> The approach presented in this section was developed specifically for the LAD process and should not be taken as guidance for compliance with any other notice, determination or other requirements we might issue.

54. To reduce compliance costs on QLPs, we use an approach to calculating qualified revenue that:
- 54.1 relies on information that is readily available across a wide range of firms;
  - 54.2 is applicable across a wide range of firms with varying products, business models, and reporting capabilities, rather than being designed to meet the business practices and concerns of any one firm; and
  - 54.3 where possible, relies on common auditable information that QLPs are likely to keep for other purposes (such as statutory reporting and billing).
55. Our 2020/21 specified information document provided a formula setting out how each QLP should calculate its qualified revenue. A summary of this formula is set out in Table 2 below.
56. This formula differs slightly from the 2019/20 TDL year as the deduction line for broadcasting services has narrowed this year due to s 85A(1)(b) of the Act no longer applying.<sup>31</sup> Now only revenue received in relation to free-to-air broadcasting services can be deducted from qualified revenue.

**Table 2: Calculating qualified revenue**

Step	Disclosed items	Value	Value	Formula
a	Operating revenue as per the relevant statutory financial statements		\$a	
b	Non-telecommunications services revenue (if any)	\$b		
c	Other non-telecommunications services revenue	<u>\$c</u>		
d	less Total non-telecommunications service revenue		\$d	$d = b + c$
e	plus Timing adjustment (if required)		\$e	
f	<b>Gross telecommunications services revenue</b>		<b>\$f</b>	$f = a - d + e$
g	less Total payments made to other QLPs		\$g	
h	less Total payments to non-QLPs for services initially provided by a QLP		\$h	
i	less Free-to-air broadcasting services revenue		\$i	
j	less Total cost of non-telecommunications good and services included in gross telecommunications services revenue		<u>\$j</u>	
k	<b>Qualified revenue</b>		<u><b>\$k</b></u>	$k = f - g - h - i - j$

57. The TDL case stated judgment was issued after we published our specified instructions. As a result of the judgment, our approach to calculating qualified revenue in this final LAD differs in two respects from the specified instructions:

- 57.1 In the specified instructions, we treated an operator of a satellite transmitting signals into New Zealand as a liable person, and revenue from that

<sup>31</sup> See paras 67-68 below for details.

transmission service as qualified revenue.<sup>32</sup> As discussed above in the Legal Framework section, the Court found that a satellite operator in those circumstances is not a liable person and, as such, nor is revenue earned in those circumstances qualified revenue;

- 57.2 In the specified instructions, we treated revenue from broadcasting transmission services supplied to a free-to-air broadcaster, which the broadcaster then uses to broadcast its content to end-users free of charge, as falling outside the s 85A(1)(a) exclusion. In this final LAD, we treat such revenue as falling within the exclusion, and therefore not as qualified revenue.

#### *Gross telecommunications services revenue*

58. In their s 83 disclosures QLPs started with their operating revenue figure and made deductions for non-telecommunications services revenue to calculate their gross telecommunications services revenue.
59. Our specified information document, along with the supplementary instructions for broadcasters, provided guidance to QLPs on how different revenue streams should be treated in their disclosures. This included listing the liability status of common revenue streams for telecommunications companies.<sup>33</sup>

#### *Timing adjustments*

60. As with previous years, QLPs were required to provide specified information for the 1 July to 30 June financial year.
61. For those QLPs who have year-ends other than 30 June we allowed them to make a timing adjustment to adjust their gross telecommunications revenue to reflect the 1 July 2020 to 30 June 2021 TDL year.
62. To provide assurance on the accuracy of the timing adjustment, QLPs who sought to rely on the alternative assurance option were required to provide director certification.<sup>34</sup>

#### *Net revenue approach*

63. A core part of our approach to calculating qualified revenue is the use of a net revenue method. We have used this method since the TDL was established in 2011. Earlier LADs provide detailed explanations for our choice of the net revenue method,

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<sup>32</sup> See “Supplementary section 83 guidance for broadcasting QLPs”. Accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0027/258255/Supplementary-section-83-guidance-for-broadcasting-QLPs-30-June-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0027/258255/Supplementary-section-83-guidance-for-broadcasting-QLPs-30-June-2021.pdf)

<sup>33</sup> See Attachment A of the 2020/21 specified information document.

<sup>34</sup> QLPs relying on the default assurance option (ie, an assurance report on their specified information) were not required to provide directors certification as the timing adjustment would have been included in the assurance report audit.



but in short, we chose this method as it captures revenue earned by both wholesalers and retail service providers and it avoids double taxation.<sup>35</sup>

64. In practice, our use of the net revenue method means that we allow QLPs to make the following deductions from their qualified revenue:
- 64.1 total payments to other QLPs; and
  - 64.2 total payments to non-QLPs for services initially provided by a QLP.
65. Both these deductions are limited to payments made for telecommunications services used in the supply of telecommunications services to the QLP's customers.
66. The paragraph 64.2 deduction is rare and is only used to deal with situations where a non-QLP is acting as an intermediary between a liable upstream provider and a liable downstream provider of telecommunications services.

#### *Section 85A*

67. Section 85A of the Act provides certain exclusions from qualified revenue for revenue received in relation to broadcasting services:
- 67.1 subsection (1)(a) excludes any amount of revenue received in relation to a broadcasting service that is supplied to end-users free of charge; and
  - 67.2 subsection (1)(b) excludes any amount of revenue received before 1 July 2020 in relation to a broadcasting service.
68. As subsection (1)(b) of s 85A does not apply from the 2020/21 TDL onwards the scope of s 85A deduction allowed has narrowed. For the 2020/21 TDL, QLPs were only able to make deductions under s 85A for revenue received in relation to a broadcasting service that is supplied to end-users free of charge.

#### *Bundles*

69. Operators sometimes sell services to consumers in bundles.<sup>36</sup> The bundled price is typically less than the combined prices of purchasing all the products in a bundle separately.
70. If telecommunications goods and services and non-telecommunications goods and services are sold by a QLP in a bundle, the qualified revenue calculation needs to account for this to ensure that QLPs that offer such bundles are not disadvantaged compared to QLPs that do not offer bundles. If such allowances were not made, the

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<sup>35</sup> For example, see our final 2011/12 TDL LAD at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/61657/Telecommunications-Development-Levy-liability-allocation-final-determination-2011-12-27-June-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/61657/Telecommunications-Development-Levy-liability-allocation-final-determination-2011-12-27-June-2013.pdf)

<sup>36</sup> Bundling refers to a situation where two or more goods are sold together. Most cases that we deal with in the TDL are mixed bundles, which is where components of the bundle are available on a standalone basis and available in a bundle.

QLPs that offer bundles would effectively pay the TDL on revenue attributable to the provision of non-telecommunications goods and services.

71. As with previous years, our TDL methodology allows for QLPs to account for bundles by either using a:
  - 71.1 *separate revenue approach* - identifying and excluding the revenue attributable to the non-telecommunication services; or
  - 71.2 *deduction approach* – subtracting the cost of the non-telecommunication services.
72. The deduction approach can only be used in situations where a QLP cannot use the separate revenue approach. In practice both approaches are used by QLPs but the adoption of NZ IFRS 15 has seen more QLPs move towards the separate revenue approach.
73. Our 2020/21 specified information document provided guidance to QLPs on the use of the deduction approach.<sup>37</sup>
74. Our supplementary guidance document for broadcasters prescribed a revenue apportionment methodology for broadcasting subscription and advertising revenue.<sup>38</sup> This methodology allows broadcasters to identify the ‘non-telecommunications’ element of these revenue streams and deduct them through the separate revenue approach.

### **Compliance and assurance**

75. QLPs were required to provide an assurance report or an audit report by an independent qualified auditor on their specified information. These reports provide us with a reasonable level of confidence as to the processes used to prepare information and the reliability of the information. The auditor is expected to identify and correct deficiencies in processes and information and provide assurance of its reliability.
76. We reviewed all information received from QLPs under s 83 for compliance with our specified information instructions. This included checking the disclosures for completeness, the reasonableness of information provided, and the consistency of how different QLPs addressed comparable issues.
77. Our review identified several issues, which we have raised with the relevant QLPs. These issues were technical in nature, relating to the specifics of the individual QLPs, and therefore did not require consultation. In these cases, the QLP provided us with a satisfactory explanation or additional information when requested.

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<sup>37</sup> See paras 54-56 of the 2020/21 specified information document.

<sup>38</sup> See paras 27-42 of “Supplementary section 83 guidance for broadcasting QLPs”, accessible at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0027/258255/Supplementary-section-83-guidance-for-broadcasting-QLPs-30-June-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0027/258255/Supplementary-section-83-guidance-for-broadcasting-QLPs-30-June-2021.pdf)

78. All QLPs are responsible for ensuring that they comply with s 83. The Act makes it a breach to fail, without reasonable excuse, to comply with s 83 of the Act.
79. Where we identify a likely breach of s 83, we must consider the appropriate enforcement response. Any failure to immediately rectify identified non-compliance may increase the seriousness of the breach, and will be taken into account in determining the appropriate enforcement response.
80. The Commission uses enforcement criteria to assist 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>39,40</sup> The Commission's enforcement criteria are:
- 80.1 extent of detriment;
  - 80.2 seriousness of conduct; and
  - 80.3 public interest.
81. Our enforcement options include:
- 81.1 issuing a compliance advice letter;
  - 81.2 issuing a warning letter;
  - 81.3 serving a civil infringement notice under s 156D of the Act, incorporating a penalty of \$2,000;
  - 81.4 agreeing an out of court settlement; or
  - 81.5 applying to the High Court for an order requiring payment of a pecuniary penalty (of up to \$300,000) to the Crown under s 156L of the Act.<sup>41</sup>

### **Allocation of levy**

82. The proportion of the TDL required to be paid by each QLP is determined by its share of the total qualified revenue earned by all QLPs for the TDL period.
83. In accordance with s 85(1)(a) and (b) of the Act, Table 3 shows the qualified revenue amounts that we have determined, and the amount of the TDL payable by each liable person.

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<sup>39</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>

<sup>40</sup> The Commission must also take into account the matters listed in section 156C when making an enforcement decision.

<sup>41</sup> Section 156L(3)(c) of the Act empowers the High Court to impose a penalty of up to \$300,000 for a breach of s 156(1)(k).

**Table 3: Levy allocation**

QLP <sup>†</sup>	Qualified revenue (\$)*	% of industry qualified revenue	Amount of TDL to pay (\$)
Spark group	\$1,430,636,941	32.86%	\$3,333,873.57
Vodafone New Zealand Ltd <sup>^</sup>	\$1,107,723,000	25.44%	\$2,581,373.60
Chorus group	\$879,307,036	20.20%	\$2,049,086.25
Two Degrees group	\$412,644,000	9.48%	\$961,601.71
Orcon group	\$129,398,834	2.97%	\$301,543.56
Tuatahi First Fibre Ltd**	\$96,537,000	2.22%	\$224,964.24
Enable Services Ltd**	\$79,968,000	1.84%	\$186,352.80
Sky Network Television Ltd	\$35,727,700	0.82%	\$83,257.77
Trustpower Ltd <sup>^</sup>	\$33,572,100	0.77%	\$78,234.48
Kordia Ltd**	\$33,101,000	0.76%	\$77,136.66
Vital group	\$16,559,015	0.38%	\$38,588.17
Vector Communications Ltd	\$16,046,000	0.37%	\$37,392.67
Northpower Fibre Ltd **	\$12,785,000	0.29%	\$29,793.42
Lightwire Ltd	\$12,487,132	0.29%	\$29,099.29
Devoli group	\$10,125,271	0.23%	\$23,595.35
Now New Zealand Ltd	\$9,411,000	0.22%	\$21,930.85
Voyager group	\$9,179,668	0.21%	\$21,391.77
Inspire Net group	\$8,554,987	0.20%	\$19,936.05
MyRepublic Ltd	\$8,195,000	0.19%	\$19,097.15
Plan B group	\$6,107,189	0.14%	\$14,231.84
Todd Corporation group	\$3,121,781	0.07%	\$7,274.82
Transpower New Zealand Ltd**	\$2,400,000	0.06%	\$5,592.82
<b>Total Industry</b>	<b>\$4,353,587,654</b>	<b>100.00%</b>	<b>\$10,145,348.84</b>

† Any reference to a group (eg, Spark group) is a reference to a group of bodies corporate that, for the purposes of the TDL, are treated as one person under s 79 of the Act. See Attachment A for a full list of bodies corporate that comprise each QLP group.

\* A firm with telecommunications revenue over the \$10m minimum telecommunications revenue threshold for inclusion may have a reported qualified revenue of under \$10m due to adjustments.

\*\* Section 79 of the Act requires us to treat these Crown companies as one QLP when assessing who is required to contribute to the TDL, including whether their combined qualified revenue exceeds the \$10m telecommunications revenue threshold. However, they provided separate disclosures, so their TDL allocations are shown separately.

<sup>^</sup> Section 79 of the Act requires us to treat these majority Infratil owned companies (Vodafone and Trustpower) as one QLP when assessing who is required to contribute to the TDL, including whether their combined qualified revenue exceeds the \$10m telecommunications revenue threshold. However, they provided separate disclosures, so their TDL allocations are shown separately.

Note: UltraFast Fibre Limited changed its name to Tuatahi First Fibre Limited on 1 November 2021, and Vocus group has rebranded to Orcon group

## Attachment A: List of 2020/21 TDL QLPs

85. Tables 1 and 2 below list the companies (or groups of companies) that, based on the information before us, we consider are liable for the 2020/21 TDL, ie, are QLPs. However, it is the responsibility of businesses involved in providing telecommunications services to determine whether they are QLPs and therefore must comply with the requirements under subpart 2 of Part 3 of the Act.

### Listing the QLPs

86. The Commission has identified two categories of QLPs:
- 86.1 *QLP groups* – groups of connected bodies corporate that are treated as a single QLP by virtue of s 79 of the Act (identified in Table 1); and
- 86.2 *Independent QLPs* – companies without connected bodies corporate (identified in Table 2).

**Table 1: QLPs that include interconnected bodies corporate under s 79 of the Act**

QLP Group
<p><b>Chorus group:</b></p> <ul style="list-style-type: none"> <li>• Chorus Ltd; and</li> <li>• Chorus New Zealand Ltd.</li> </ul>
<p><b>Crown companies group:</b></p> <ul style="list-style-type: none"> <li>• Kordia Ltd;</li> <li>• Transpower New Zealand Ltd;</li> <li>• Northpower Fibre Ltd;</li> <li>• Northpower LFC2 Ltd;</li> <li>• Enable Networks Ltd;</li> <li>• Enable Services Ltd; and</li> <li>• Tuatahi First Fibre Ltd.<sup>42</sup></li> </ul>
<p><b>Devoli group:</b></p> <ul style="list-style-type: none"> <li>• Devoli Ltd;</li> <li>• Layer 2 Co Ltd; and</li> <li>• Mynx Internet Ltd.</li> </ul>
<p><b>Infratil group:</b></p> <ul style="list-style-type: none"> <li>• Vodafone New Zealand Ltd;</li> <li>• Vodafone Next Generation Services Ltd;</li> <li>• Bay City Communications Ltd; and</li> <li>• Trustpower Ltd.</li> </ul>
<p><b>Inspire Net group:</b></p> <ul style="list-style-type: none"> <li>• Inspire Net Ltd; and</li> <li>• Inspired Networks Ltd.</li> </ul>
<p><b>Plan B group:</b></p> <ul style="list-style-type: none"> <li>• Plan B Ltd;</li> <li>• Internet Company of New Zealand Ltd; and</li> </ul>

<sup>42</sup> UltraFast Fibre Limited changed its name to Tuatahi First Fibre Limited on 1 November 2021.

- Solarix Holdings Ltd.

#### **Spark group:**

- Spark New Zealand Ltd;
- Spark New Zealand Trading Ltd; and
- Digital Island Ltd.

#### **Todd Corporation group:**

- Nova Energy Ltd;
- Total Consumer Services Ltd (MegaTEL); and
- Todd Digital Ltd.

#### **Two Degrees group:**

- Two Degrees Mobile Ltd;
- Two Degrees Networks Ltd; and
- Two Degrees New Zealand Ltd.

#### **Vital group:**

- Vital Ltd; and
- Vital Data Ltd.

#### **Orcon group:<sup>43</sup>**

- Vocus (New Zealand) Ltd;
- Vocus Group NZ Ltd;
- M2 NZ Ltd;
- CallPlus Ltd;
- CallPlus Services Ltd;
- 2Talk Ltd;
- Flip Services Ltd;
- Orcon Ltd; and
- NZ Fibre Communications Ltd (Stuff Fibre).

#### **Voyager group**

- Voyager Internet Ltd;
- HD Net Ltd; and
- HD Net 2020 Ltd.

**Table 2: Independent QLPs**

Independent QLP
• <b>Lightwire Ltd.</b>
• <b>Sky Network Television Ltd.</b>
• <b>Now New Zealand Ltd.</b>
• <b>MyRepublic Ltd.</b>
• <b>Vector Communications Ltd.</b>

<sup>43</sup> Vocus group has rebranded to Orcon group.