

2 April 2020

Dear stakeholders:

### **Consultation on the treatment of broadcasting services revenue in the Telecommunications Development Levy (TDL)**

1. On 12 December 2019 the Commission published “Treatment of broadcasting services revenue in the Telecommunications Development Levy (TDL): Consultation paper” (Consultation Paper) and invited both submissions and cross submissions on it.
2. We would like to thank Chorus, Kordia, MediaWorks, NZME, Optus, Radio Broadcasters Association, Sky and TVNZ for providing submissions and Kordia and Sky who provided cross submissions.<sup>1</sup>

### **Framework paper**

3. We previously indicated that we would publish a framework paper to clarify how the Commerce Commission (**Commission**) has interpreted the relevant amendments to the Telecommunications Act 2001 (the **Act**) in March 2020.
4. The submissions on the Consultation Paper raised a number of fundamental issues relating to the interpretation of the relevant amendments. These issues mainly concern who may fall within the definition of ‘liable person’ under section 5 of the Act, and therefore affect who may be required to contribute to the TDL.
5. Given the disagreement between submitters’ and the Commission’s positions on these issues, the potential monetary impact on parties of our decisions, the statutory timeframes for those decisions, flow on consequences for others required to contribute to the TDL and for the collection of the TDL should our decision be disputed at that time, we consider that the most appropriate way to resolve the issues is to state a case for the High Court under section 100A of the Commerce Act 1986.<sup>2</sup> Under the case stated procedure, the Commission makes an application to the High Court seeking the Court’s opinion on questions of law. These questions of law that the Commission will seek an opinion on will principally involve matters of statutory interpretation raised in submissions.

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<sup>1</sup> All public submissions and cross submissions can be found on the Commission’s [website](http://www.comcom.govt.nz).

<sup>2</sup> Section 100A of the Commerce Act 1986 applies to the Telecommunications Act 2001 under section 15 of the Telecommunications Act.

6. We are looking to make an application to the High Court as soon as reasonably practicable. While timeframes for court processes are uncertain at the moment, we hope to receive an opinion from the High Court before we are required to make a final TDL determination in December 2021.

#### **1 April 2020 deadline**

7. Under section 82 of the Act all qualifying liable persons (**QLPs**) for the 2019/20 TDL year must provide 2018/19 financial statements to the Commission by 1 April 2020.<sup>3,4</sup>
8. We are mindful of the importance of the telecommunications sector focussing on providing essential services to New Zealanders during the COVID-19 pandemic, particularly in light of the substantial increase in use of our telecommunications networks during the current Alert Level 4 period.
9. For those parties who may have become liable persons for the TDL in the past year, and may not have complied with the obligation under section 82, we understand that there may have been difficulties in providing the necessary financial statements by 1 April. We can confirm that we will exercise our enforcement discretion not to take action under section 156B of the Act if these statements are able to be submitted by 1 June 2020. We will also be sensitive to this issue when considering when to use our powers under section 81 to seek financial information from those parties that we consider might have become liable persons in the last year.
10. We will keep this matter under review, and may provide further extensions in due course, depending on the progress of the Covid-19 Alert levels.
11. As the section 100A case will be heard after the 1 April 2020 deadline some stakeholders who are potentially affected by the amendment to the Act may be unsure whether they are a QLP. We encourage any parties, including those involved in broadcasting transmission, who may meet the QLP criteria to provide 2018/19 financial statements to the Commission, noting that:
  - 11.1 Providing financial statements as part of the 1 April 2020 deadline does not make a party a QLP. Rather the information helps the Commission determine which parties meet the QLP criteria for the 2019/20 TDL year;
  - 11.2 The financial statements do not need to be audited;

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<sup>3</sup> 2018/19 QLPs do not need to submit financial statements as this information was already supplied as part of their 2018/19 qualified revenue disclosures.

<sup>4</sup> For more information on the QLP criteria see paragraphs 30 to 36 of our consultation paper.

- 11.3 2018/19 financial statements that have been prepared for other purposes are sufficient to satisfy section 82(a);<sup>5</sup>
  - 11.4 The Commission has powers under section 81 of the Act to serve notices to parties we suspect may have met the QLP criteria but failed to provide information under section 82;
  - 11.5 Revenue received before 1 July 2020 by a liable person in relation to any other broadcasting service is excluded from a liable person's qualified revenue (although is included in determining 'minimum telecommunications revenue' under section 80 of the Act).
12. We are happy to discuss any concerns that stakeholders have about the 1 April 2020 deadline.

**Next steps**

*Section 100A case*

- 13. We will keep stakeholders updated on the general progress of the section 100A case.
- 14. Some stakeholders are likely to have a particular interest in the outcome of the section 100A case. We are likely to be in contact with these stakeholders shortly about their potential involvement in the case. This may include, for example, clarifying factual matters related to their business, in order to provide a set of agreed facts to the High Court

*2019/20 TDL*

- 15. On 30 June 2020 the Commission will publish a draft list of 2019/20 QLPs alongside our 2019/20 specified information and assurance report instructions and specified information templates.



Dr Stephen Gale  
Telecommunications Commissioner

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<sup>5</sup> We may require parties to provide additional information to enable us to verify their telecommunications revenue.