**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV 2020-485-748**
**[2021] NZHC 2777**

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| UNDER | Section 100A of the Commerce Act 1986 |
| IN THE MATTER OF | a case stated by the Commerce Commission relating to the application of the Telecommunications Development Levy under Part 3 of the Telecommunications Act 2001 |
| BETWEEN | COMMERCE COMMISSION<br>Applicant |
| AND | KORDIA GROUP LIMITED<br>First Respondent |
| | OPTUS SATELLITE PTY LIMITED<br>Second Respondent |
| | SKY NETWORK TELEVISION LIMITED<br>Third Respondent |
| | TELEVISION NEW ZEALAND LIMITED<br>Fourth Respondent |
| | CHORUS NEW ZEALAND LIMITED<br>Intervenor |

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| Hearing: | 12 April 2021 (further submissions received 22 April 2021) |
| Counsel: | D J Cooper and D A K Blacktop for Applicant<br>N C Crang and A L Sherriff for First Respondent<br>D A Campbell for Second Respondent<br>L A O'Gorman for Third Respondent<br>R H Patterson for Fourth Respondent<br>T D Smith and S Koo for Chorus New Zealand Limited (Intervenor) |
| Judgment: | 15 October 2021 |

## JUDGMENT OF MALLON J

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## Introduction

[1] The Telecommunications Act 2001 regulates the supply of telecommunications services. As part of this regulation, a Telecommunications Development Levy (TDL) regime is established under the Act. The TDL is a levy that is collected from certain telecommunications industry participants. The levy can be used to fund rural telecommunications infrastructure, upgrades to the emergency calling system and other telecommunication-related services that would not otherwise be supplied at an affordable price.

[2] The Commerce Commission is responsible for administering this regime. It has brought this case stated proceeding arising from amendments made to the Act by the Telecommunications (New Regulatory Framework) Amendment Act 2018.

Amongst other things, these amendments made changes that meant broadcasting services were subject to the Act and therefore potentially subject to the TDL regime. The Commission has posed three questions for the Court to assist it with its statutory role in assessing which services that were previously excluded from the regime are now within it.

[3] Those questions are:

1. If the public:

   (a) can receive a telecommunication (as defined in the Telecommunications Act) from a network; but

   (b) cannot send a telecommunication (as defined in the Telecommunications Act) through that network,

   is that network "used, or intended to be used, in whole or in part by the public for the purpose of telecommunication" as those words are used in the definition of a "public telecommunications network" (or PTN) in the Telecommunications Act?

2. Is the operator of a satellite:

   (a) positioned outside New Zealand; but

   (b) transmitting any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature via radio waves from a transponder located aboard the satellite into New Zealand for receipt by end-users in New Zealand,

   providing a "telecommunications service" in New Zealand for the purposes of the Telecommunications Act?

3. If a liable person earns revenue from supplying a "telecommunications service" (as defined in the Telecommunications Act) to a "broadcaster" (as defined in the Broadcasting Act) for the purpose of enabling that broadcaster to supply a broadcasting service to end-users free of charge, is that revenue received by that liable person "in relation to a broadcasting service that is supplied to end-users free of charge" for the purposes of s 85A(1)(a) of the Telecommunications Act?

[4] The respondents are all entities that are potentially affected by the 2018 Amendment Act depending at least in part on the answer to these questions:

(a) Optus Satellite Pty Limited (Optus), a company resident in Australia, owns a satellite (Optus D1), which is a device in orbit above the Earth.

It provides satellite transponder capacity to New Zealand-based users. It is potentially affected by the answer to Question 2.

(b) Kordia Group Limited (Kordia) is a state-owned enterprise that broadcasts free-to-air television and radio throughout New Zealand. It owns and operates a national network of broadcasting towers. It acquires satellite transponder services on Optus D1 from Optus. It contracts with free-to-air broadcasters such as Television New Zealand Limited (TVNZ), MediaWorks, Māori Television Service, Radio New Zealand (RNZ), the Office of the Clerk, and others to provide transmission services. It is potentially affected by the answer to Questions 1 and 3.

(c) Sky Network Television Limited (Sky) broadcasts content to its subscribers. It acquires satellite transponder services on Optus D1 from Optus. It is potentially affected by the answer to Question 1.

(d) TVNZ is a free-to-air broadcaster. It is owned by the Crown but operates as a self-funded commercial entity, with advertising providing its main source of revenue. It contracts with Kordia for the transmission of its broadcasting services over Kordia's broadcasting network. It is potentially affected by the answers to Questions 1 and 3.

[5] Chorus is the owner of public telecommunication networks. It is subject to the TDL. It was granted leave to intervene as a party potentially affected by any Court determination affecting who is liable for the TDL and how "telecommunication services" is interpreted. However, it abides the Court's decision on the answers to the questions posed.

**Preliminary matters**

*The Commission's process*

[6] The Commission is responsible for determining the amount of the TDL payable by certain telecommunications industry participants in accordance with the Act. The

process requires each "liable person" (discussed below) to provide information to the Commission each financial year.[1] The Commission prepares a draft liability allocation determination for each financial year.[2] There is then an opportunity for submissions and the Commission can hold a conference at which anyone with a material interest in the determination may attend.[3] The Commission then makes a final liability allocation determination.[4] There are statutory timeframes for these steps. A liable person has a right of appeal to the High Court against a final determination of the amount of their "qualified revenue" (discussed below).[5]

[7] The Commission considered that the 2018 amendments had implications for the TDL regime. It considered that the amendments meant that additional persons would now be liable to be levied and that additional revenue would be included as qualified revenue in the calculation of the levy payable. It published a consultation paper on 12 December 2019 setting out its initial views. It sought feedback from interested parties. Kordia, Optus, Sky and TVNZ were amongst those who provided submissions. The issues raised in this process led to the Commission's decision to bring this case stated proceeding.

[8] In the meantime, as part of its process for the TDL liability allocation determination for the 1 July 2020 to 30 June 2021 year, the Commission published instructions earlier this year regarding the information it required from liable persons. That information was to be provided by 22 September 2021. The Commission was then to make reasonable efforts to publish a draft determination by 20 October 2021. The closing date for submissions to be received would then be 18 November 2021 and the Commission would then make reasonable efforts to publish a final determination by 16 December 2021.

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1 Telecommunications Act 2001, ss 82 and 83.
2 Section 84.
3 Sections 84 and 86.
4 Section 87.
5 Section 100.

*The case stated procedure*

[9] The Commission may at any time state a case for the opinion of the court on any question of law arising in any matter before it.[6] The procedure requires that the Commission (as the relevant "tribunal" in which the questions of law arise) must state concisely, amongst other things, the questions on which the opinion of the court is sought and the relevant facts necessary to enable the court to decide the questions.[7]

[10] If there is any dispute about the facts, it is for the Commission to resolve in settling the case. If the court considers there are issues about the case that need resolution in order for it to determine the questions, it sometimes may be appropriate to refer the matter back to the Commission.[8]

[11] The Commission's Case Stated has complied with the case stated procedure. It objects to additional facts that are referred to in the respondents' submissions and which seek to answer directly whether they are "liable persons" for the purposes of the TDL. The Commission is correct that it is the questions as posed that must be answered (even though they may effectively determine whether the respondents are liable persons).

[12] Nevertheless, context is important when determining questions of law. Therefore, if I were to consider that factual context beyond that set out in the Commission's Case Stated was necessary and that this context might be disputed, I would need to revert back to the Commission for its position on whether that context is in fact disputed or possibly decline to answer the question(s) stated. However, I have not found it necessary to go beyond the Case Stated to answer those questions.

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6 Section 15(j); and Commerce Act 1986, s 100A.
7 High Court Rules 2016, r 21.9(1)(b).
8 *McGechan on Procedure* (online ed, Thomson Reuters) at [HR21.9.02].

## The Telecommunications Act

*Background*

[13] The purpose of the Act is to regulate the supply of telecommunication services.[9] It was enacted against a background of major changes to the sector. Although a legal monopoly in the supply of the telecommunication services had ended, Telecom, which was sold to private interests, remained dominant in the sector. Competitors facing difficulties entering the market were left to seek redress via generic competition law, which proved unsatisfactory in addressing those challenges and led to concerns that New Zealanders were paying too much for their telecommunication services. A ministerial inquiry followed, leading to the passing of the Act.[10]

[14] As the market and technology and views about them evolved, amendments were made. These included amendments in 2006, 2011 and 2018 relating to the operational and then structural separation of Telecom, ultra-fast broadband, information disclosure and price-quality path obligations relating to fibre fixed-line access and the gradual removal of copper-based services amongst other things.

[15] As the Act presently stands, it has two telecommunications access regimes. One that applies to the provision of fibre fixed-line services (Part 6 of the Act) and one that applies to other telecommunications services (Part 2 of the Act). Both of these Parts have as their purpose promoting competition in telecommunication markets for the long-term benefit of end-users of telecommunication services in New Zealand.[11] Part 2 seeks to achieve this in different ways depending on whether the telecommunication services that are regulated are classified as designated services or specified services.[12] Part 6 involves price-quality path and information disclosure regulation and other features to support those regulatory tools.

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9 Section 3(1).

10 See Robert Clarke and Sean Mosby *Telecommunications in New Zealand* (Thomson Reuters, 2021) at [1.1.1(2) and (3)] for a discussion on the background to the Act. The Government's objective for the inquiry was "to ensure that the regulatory environment delivers cost-efficient, timely, and innovative telecommunications services on an ongoing, fair and equitable basis to all existing and potential users": see *Ministerial Inquiry into Telecommunications Final Report* (27 September 2000) at 1.

11 Sections 18(1) and 162.

12 Section 4.

[16] Part 3, which now contains the TDL regime, is about certain service obligations and how they are funded. The background to the regime begins with Telecom's "Kiwishare obligation", which it had prior to the enactment of the Act. Pursuant to this "Kiwishare obligation", Telecom was to continue to make ordinary residential telephone services as widely available as they had been (as at 11 September 1990) (a form of what is known as "universal service").[13] The Act provided a statutory framework to support the new Kiwishare arrangements under a broader regime known as "telecommunications services obligations" (TSO). The Explanatory Note to the Telecommunications Bill, which brought in this framework, said the TSO would "reflect government social policy objectives to ensure certain telecommunications services are available in areas where they may not otherwise be provided on a commercial basis".[14]

[17] When the Act was enacted, the original TSO was an instrument signed by the Crown and the then vertically-integrated Telecom. It included Telecom's agreement to provide enhanced rural internet services and to continue to provide free local (dial-up) internet calls for residential customers.[15] Levies were paid by anyone connected to the country's single national telephone network, which was then operated by Telecom. As noted in *REANNZ v Commerce Commission*, determining the levy was relatively straightforward in these circumstances.[16]

[18] In 2011, in anticipation of the structural separation of Telecom, the TDL regime was introduced.[17] As further explained in *REANNZ*:

> [14] … But as Telecom's network was unbundled, and as technology transitioned from telephone to broadband, the TSO regime was replaced with the new TDL regime. The new regime was intended to be technology-neutral and to focus, in an unbundled environment, on businesses generating telecommunications revenue from end-users.

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13 *Telecommunications in New Zealand*, above n 10, at [10.2.1].

14 Telecommunications Bill 2001 (124-1) (explanatory note) at 2, discussed in *Telecommunications in New Zealand*, above n 10, at [10.2.1].

15 *Telecommunications in New Zealand*, above n 10, at [10.2.2].

16 *Research and Education Advanced Network New Zealand Ltd v New Zealand Commerce Commission* [2018] NZHC 2724 at [14].

17 Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011. This also brought in ultra-fast and rural broadband initiatives under which successful bidders were required to make "open access" undertakings.

> [15] The Bill introducing the TDL noted that the levy would "be collected from industry participants annually and be used for the payment of TSO related compensation, non-urban telecommunications infrastructure development, and upgrades to the emergency services calling system".[18]
>
> [16] One of the policy objectives of the new regime was to ensure that funding was raised in a "fair, transparent and efficient manner".[19] A general taxation option was not adopted as it was considered that it would be more appropriate to recover the levy from the beneficiaries of the funded activities:[20]
>
> > The funding to meet these needs should be sourced from users of telecommunications services as they (rather than taxpayers generally) benefit from them.
>
> [17] The same point was made when the Bill was introduced to the select committee before its second reading:
>
> > … as the expenditure of these funds will primarily be for the benefit of end users of telecommunications services in New Zealand, it was considered that they, rather than the general public, constituted the appropriate base for levying the TDL amounts. By adopting a proportional-revenue approach to allocating levy liabilities, the TDL minimises economic distortions and allows telecommunications service providers to pass through the costs of the TDL to end-users.
>
> [18] The TDL was set at $50 million per annum for the 2016/2017 financial year. From the 2019/2020 year, the TDL will be reduced to $10 million, then adjusted for inflation annually thereafter.

[19] As well as providing for Telecom's structural separation and the new TDL regime, the 2011 amendments brought in the "public telecommunications network" (PTN) definition that is the subject of Question 1 in this proceeding. This was to make the new regime "technology-neutral", as referred to in the extract from *REANNZ* above.

*Broadcasting amendments*

[20] As enacted in 2001, "telecommunication" was defined as it now is (see below) but expressly provided that it "does not include any conveyance that constitutes broadcasting". "Telecommunication services" was also defined as it now is (see below).

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18 Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill 2010 (250-1) at 3.

19 Ministry of Economic Development *Regulatory Impact Statement: Reform of the Telecommunications Service Obligation Framework and Industry Levy* (23 November 2010) at [78(d)].

20 At [194].

[21] "Broadcasting" was (and remains) defined as having "the same meaning as in section 2(1) of the Broadcasting Act 1989. The definition of "broadcasting" in that subsection of the Act is:[21]

> 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

[22] In 2005 the definition of "telecommunication" was amended to add "for the purposes of subpart 2 of Part 4 includes "any conveyance that constitutes broadcasting" but "for all other purposes, does not include any conveyance that constitutes broadcasting".[22] This amendment does not have any significance for present purposes, other than that it retained the broadcasting exclusion from the definition of "telecommunication" except for this special purpose.[23]

[23] This broadcasting specific inclusion and general exclusion were removed by the 2018 amendments. The definition of "broadcasting" (meaning s 2(1) of the Broadcasting Act) was retained in the Act. It is not in dispute that the definition of "telecommunication" encompasses the conveyance of broadcasting content by radio waves or other means of telecommunication. There is a dispute about the implications of this for the TDL regime.

[24] Public documents show that the 2018 amendments arose following a review of the Act (required under s 157AA). The Minister released a Discussion Document in

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21 By referring only to s 2(1) of the Broadcasting Act definition, "broadcasting" in the Telecommunications Act 2001 is not confined to broadcasters of programmes (or those who control them) as the Broadcasting Act is by virtue of s 2(2).

22 This subpart sets out rules for the maintenance of networks.

23 Subpart 2 of Part 4 concerns network maintenance and provides rights of access for network operators to enter land to construct, erect, lay or maintain lines. This amendment appears to have been a convenient mechanism for providing broadcasting network operators the same rights given to (other) telecommunication network operators. Alongside the amendment to the definition of telecommunication, the purpose statement in s 102 of the Act (which provided for the Minister to declare a person to be a network operator for the purposes of the Act) was amended: it now provided that its purpose was to "facilitate entry into, and competition in, telecommunication markets and broadcasting markets".

September 2015.[24] Following submissions on that document, the Ministry of Business, Innovation and Employment (MBIE) issued a Regulatory Impact Statement dated 23 March 2016.[25] This made recommendations about sector-specific regulation of copper and ultra fast broadband fixed-line services. It also discussed the treatment of broadcasting transmission infrastructure. At that time MBIE's view was as follows (footnotes omitted):

> 35 The fourth issue is whether to remove the existing exemption for 'broadcasting' in the Telecommunications Act. As part of the Review, consideration was given to whether this exemption should be removed, which would mean that broadcasting services delivered on traditional broadcasting networks (for example Kordia's digital terrestrial network and Optus's satellite network) would be subject to sector-specific regulation in the same way as telecommunications services. In the absence of sector-specific regulation, traditional broadcasting networks are subject to generic competition law in the Commerce Act.
>
> 36 Technology developments have resulted in consumers changing the way they receive audio-visual and audio programming (i.e. television and radio-like services). This programming is now conveyed using a range of satellite, digital terrestrial, broadband or mobile networks, and received by a range of devices, including television sets, personal computers and smartphones. The growth of broadband and mobile networks has also enabled consumers to increasingly use on-demand or time-delayed (i.e. catch-up) services.
>
> 37 We sought comments on this matter in the Discussion Document, and subsequently consulted directly with both broadcasting network owners and access seekers. Stakeholders generally indicated that technology developments have increased competition for the delivery of broadcasting services, and so traditional broadcasting networks face more competition. Broadcasters of television-like services are growing their on-demand and time-delayed service offerings and have a choice of transmission networks (indeed end users are now more focussed on services than the underlying technology delivering them, given its proliferation). Consequently, we consider that there is no clear problem with broadcast delivery services that requires sector-specific regulation at this time.
>
> 38 Accordingly, we consider that the status quo is sufficient and there is no compelling case for change. We do not propose any change to the broadcasting exemption (and as such this issue is not analysed further in this RIS).

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[24] Ministry of Business, Innovation and Employment *Regulating communications for the future: Review of the Telecommunications Act 2001* (September 2015).

[25] Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Initial decisions on post-2020 fixed line communications regulatory framework* (23 March 2016).

[25] Similarly, in April 2016 MBIE said:[26]

> We have decided that there is no case to impose additional regulation for broadcasting infrastructure. Digital convergence is increasing competition, with content providers able to distribute online as well as through traditional means.
>
> As part of the convergence work programme, the Government is considering reforms to the regulation of broadcasting content to make it fit for purpose for a digital age.

[26] Consistent with this policy work, the Telecommunications (New Regulatory Framework) Amendment Bill as introduced on 8 August 2017 was concerned with copper and fixed fibre regulation. It did not introduce any change directed to bringing broadcasting into the Act.[27] However, in Departmental Reports to the Economic Development, Science and Innovation Committee dated 10 April and 20 April 2018, officials recommended that the definition of "telecommunication" be amended to include "broadcasting transmission services, but continue to exclude aggregation and content services".[28] In making that recommendation, it said:

> 169. Convergence has led to the breaking down of boundaries between providers of broadcasting and telecommunications services. Broadcast services are now delivered over a number of different platforms including broadband. Chorus has recently announced that it will commence a proof-of-concept trial using its fibre network to provide a direct broadcasting service to consumers' homes.
>
> 170. The definition of telecommunications in the Act currently excludes broadcasting (except in Part 4). The definition of "broadcasting" (derived from the Broadcasting Act 1989) treats "on demand" services differently from live services.
>
> 171. At a time when on-demand and live streaming over broadband networks, including fibre networks, is accelerating, the current definition of telecommunications could lead to anomalies in the future.
>
> 172. We consider that content and aggregation services should continue to be excluded from the scope of the Act. However, we think that continuing to exclude some but not all broadcasting distribution networks will become difficult to manage as broadcasting migrates to broadband platforms. We also think that making this change will increase regulatory scrutiny of traditional broadcasting distribution services, which remains a controversial area.

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26 Ministry of Business, Innovation and Employment *Announcements on the future of communication regulation* (April 2016) at 6.

27 Telecommunications (New Regulatory Framework) Amendment Bill (293-3).

28 *Telecommunications (New Regulatory Framework) Amendment Bill: Departmental Reports to the Economic Development, Science and Innovation Committee* (10 April and 20 April 2018).

> Overall, there would be greater consistency of treatment of broadcasting distribution over different technologies.
>
> 173. We have recently undertaken some targeted consultation with the main free-to-air broadcasters and with providers of traditional broadcasting distribution services such as Kordia in relation to this issue. There were mixed views about whether regulation was appropriate in the sector.
>
> 174. In the time available, we have not prepared a regulatory impact statement. We note that the change to the definition would not in itself impose regulation on any entity. The change would clarify the status of broadcasting services supplied over broadband networks, and allow the Commerce Commission to investigate and to recommend regulation of traditional broadcasting services such as Digital Terrestrial Broadcasting. However, some entities may be required to contribute to industry levies.[29]

[27] This recommendation was adopted by the Select Committee. The Committee explained its reasoning for its recommendation in its report back to the House as follows (emphasis added):[30]

> Clause 4 would amend some of the definitions in section 5 of the Act. As introduced, it does not change the definition of "telecommunication" in the Act, which currently excludes broadcasting transmission services (except in subpart 2 of Part 4). We believe the current definition could lead to anomalies in the future because of the way technological change ("convergence") is breaking down the boundaries between providers of broadcasting and telecommunications services.
>
> We recommend inserting clause 4(6) to replace the definition of "telecommunication" in section 5 of the Act with a new definition that includes broadcasting transmission services. We believe this would provide more consistency of treatment between different technologies. The new definition of "telecommunication" would not cover content and aggregation services.
>
> We note that some entities may be required to contribute industry levies as a result of this change to the definition.

[28] The amendment proposed was simply to delete the broadcasting exclusion from the definition of "telecommunication", as well as the specific broadcasting inclusion for subpart 2 of Part 4.

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29 The 10 April 2018 version of this advice stated: "However, Kordia may be required to contribute more to industry levies." This was changed to "some entities" in the later version.

30 Telecommunications (New Regulatory Framework) Amendment Bill (commentary) (293-3) at 2; and Economic Development, Science and Innovation Committee *Telecommunications (New Regulatory Framework) Amendment Bill* (4 May 2018) at 2.

[29] Subsequently, on 16 October 2018, a Supplementary Order Paper proposed amendments for the consideration of the House.[31] This included a new s 85A that would exclude the revenue from some broadcasting services from the TDL regime. The Explanatory Note simply said:

> The SOP inserts new clause 8A into the Bill, which inserts new section 85A. The amendment relates to the telecommunications development levy that is payable under subpart 2 of Part 3 of the Act. The amount of the levy is determined by reference to a liable person's qualified revenue. The amendment excludes from this revenue certain revenue derived from broadcasting services. The change is a consequence of a change made at select committee to include broadcasting within the definition of telecommunications.

*The TDL regime*

[30] Part 3 of the Act is concerned with TSOs. The purpose of this Part is set out in s 70(1) of the Act as follows:

> The purpose of this section is to facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.

[31] An "end-user" in relation to a telecommunication service means "a person who is the ultimate recipient of that service or of another service whose provision is dependent on that service".[32] The services are provided under a TSO instrument and they are funded by the Crown via a TDL.

[32] A instrument may be declared by Order in Council or deemed to be a TSO instrument.[33] Such an instrument is an arrangement between the Crown and a service provider for the supply of a particular telecommunications service or range of telecommunications services.[34] It identifies the group of end-users to whom the service must be supplied and the geographical area within which it is to be supplied.[35] It also specifies the retail price at or below which the service must be supplied and the

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31 Supplementary Order Paper 2018 (118) Telecommunications (New Regulatory Framework) Amendment Bill (293-2) (explanatory note) at 3-4.
32 Telecommunications Act 2001, s 5.
33 Sections 70(2) and 71.
34 Section 70(4)(a).
35 Section 70(4)(b) and (c).

standard of service to be supplied.[36] It may also specify the amount the Crown will pay under the instrument for each financial year.[37]

[33] Subpart 2 of Part 3 is concerned with the payment of a levy to the Crown to fund these services. That levy is made on "liable persons". This part of the Act sets out a process leading to a determination of liability allocation for each liable person. The allocation determined must be paid by the liable person to the Crown.[38] Collectively, these amounts comprise the TDL.[39]

[34] Section 90 specifies the uses to which the Crown may put the TDL as follows:

> (1) The amounts paid by liable persons … may be used for the following purposes:
>
> (a) to pay TSO charges:
>
> (b) to pay for non-urban telecommunications infrastructure development:
>
> (c) to pay for upgrades to the emergency service calling system:
>
> (d) any other purpose that the Minister considers will facilitate the supply of certain telecommunication services to groups of end-users within New Zealand to whom those telecommunication services may not otherwise be supplied on a commercial basis at a price that is considered by the Minister to be affordable to those groups of end-users.
>
> (2) The telecommunications development levy must not be used for a purpose under subsection (1)(d) unless the Minister has first consulted liable persons any persons and organisations that the Minister considers appropriate having regard to the proposed use of the levy.
>
> …

[35] Presently, the TSO is used to fund the relay service for deaf and hearing-impaired users, non-urban traditional telecommunications infrastructure development (including the expansion of rural broadband), and a mobile caller location system for emergencies. It therefore presently funds services that utilise fixed or mobile telecommunications networks and broadband networks.

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36 Section 70(4)(d) and (e).
37 Section 71A.
38 Section 89.
39 Section 99.

[36] A "liable person" means "a person who provides a telecommunications service in New Zealand by means of some component of a PTN that is operated by the person".[40] Both "telecommunications service" and "PTN" are defined.

[37] A "telecommunications service" means "any goods, services, equipment, and facilities that enable or facilitate telecommunication".[41] And "telecommunication" means:[42]

> … 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

[38] A PTN means "a network used, or intended to be used, in whole or in part, by the public for the purposes of telecommunication" and includes a "PSTN" and a "PDN". A PSTN means a "dial-up telephone network" used by the public for providing telecommunication between telephone devices. A PDN means "a data network used, or intended for use, in whole or in part, by the public".[43] A "network" means "a system comprising telecommunication links to permit telecommunication".[44]

[39] The allocation a liable person must pay is determined by a formula (a/b x c) where "a" is the amount of the liable person's "qualified revenue", "b" is the sum of all liable persons' "qualified revenue" and "c" is the TDL specified for the relevant year in Schedule 3B.[45]

[40] "[Q]ualified revenue" means:[46]

> the revenue … that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to the liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount and excluding any amount under section 85A):

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40 Section 5.
41 Section 5.
42 Section 5.
43 Section 5.
44 Section 5. A "network operator" is also defined (but is not relevant for present purposes).
45 Section 85.
46 Section 5.

(a) telecommunication services by means of its PTSN:

(b) telecommunications services by means that rely primarily on the existence of its PTN or any other PTN

[41] Section 85A sets out certain revenue from broadcasting services that is excluded from qualified revenue as follows:

> (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.

**Background facts**[47]

[42] Broadcasting involves the following stages:

(a) The production or acquisition of content (also known as programmes) to be broadcast. For example, TVNZ, MediaWorks, Kordia, and Sky own or produce television content and MediaWorks, RNZ and New Zealand Media and Entertainment (NZME) own or produce radio content.

(b) Preparation of content for transmission to end-users. It involves creating a signal that can be conveyed. This step is often referred to as encoding, compression, and multiplexing. It involves the use of specialised equipment and assets.

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47 From the Case Stated.

(c) Transmission of signals for reception by end-users via terrestrial satellite or internet networks.

(d) Reception of signals by end-users using receiving apparatus such as antenna or a satellite dish. The content in the signal can be made available for viewing either for free (free-to-air broadcasting, for example TVNZ and RNZ) or on a paid basis (pay-TV, for example Sky).

[43] The primary focus of the Case Stated is the transmission stage (at (c) above).

[44] There are three main ways of transmitting a broadcast signal in New Zealand. The first way is by terrestrial transmission. This uses land-based transmission infrastructure. The signal created is conveyed to broadcasting transmission sites (typically broadcast towers) via a fibre optic cable or other infrastructure capable of conveying a signal (referred to as a telecommunications backbone). The signal is then transmitted using radio waves (an electromagnetic wave) from a broadcast transmission site into free space for reception by end-users via an antenna. There is no "return channel" meaning that end-users cannot use the terrestrial transmission network to convey a signal to another person. End-users do not have a contractual relationship with any provider of terrestrial transmission or with those who broadcast over a terrestrial transmission network.

[45] Kordia is an example of a provider of terrestrial transmission services. It supplies these services to TVNZ, MediaWorks, Māori Television Service, RNZ, NZME, the Office of the Clerk and others. It owns and operates broadcasting towers throughout New Zealand.

[46] The second way of transmitting a broadcast signal in New Zealand is by way of satellite transmission. This involves transmitting a broadcast signal using a combination of land-based and satellite infrastructure. The signal created is conveyed to ground-based uplink antennas via a telecommunications backbone. The signal is then conveyed from an uplink antenna to a satellite. The satellite receives the signal via a transponder on the satellite. It converts the signal into a different frequency,

amplifies the signal and then conveys the signal back down to Earth, where it is received by end-users via a satellite dish at their premises.

[47] Satellite transmission uses radio waves to transmit the signals from the uplink antenna to the satellite (the uplink) and from the satellite back to earth (the downlink). The signal is modulated to a different radio frequency for the uplink and the downlink to avoid interference. A New Zealand spectrum licence to use part of the radio frequency spectrum is required for the uplink signal but not for the downlink frequency used. Downlink frequencies are not part of New Zealand's spectrum licencing regime.[48]

[48] Satellite transmission for broadcasting does not involve a "return channel", meaning that end-users cannot use the satellite transmission network to convey a signal to another person.

[49] Currently, the only satellite used for broadcasting in New Zealand is Optus D1. Optus D1 is in geostationary orbit about 37,000 kms above Papua New Guinea at the equator (160 deg E).[49] Optus provides satellite transponder capacity on Optus D1 to New Zealand-based users. It does not supply any uplink or downlink facilities in New Zealand.

[50] Kordia owns uplink facilities and acquires satellite transponder services on the Optus D1 satellite from Optus. This enables Kordia to provide satellite transmission services to TVNZ, MediaWorks, Māori Television Service, RNZ, the Office of the Clerk and others.

[51] Sky also owns uplink facilities and acquires satellite transponder services on the Optus D1 satellite from Optus. This enables Sky to broadcast its content to its subscribers.

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48 Although such licences are drafted to avoid interference with downlink frequencies.

49 The Case Stated says 37,000 kms but Optus's submissions provide a slightly closer figure. As Optus' submissions explain, a satellite in geostationary orbit follows the Earth's rotation (meaning it is in a fixed position relative to the territory below it).

[52] The third way of transmitting a broadcasting signal is by internet transmission. This involves transmitting a signal from a server to end-users via fixed-line (copper, fibre optic, or hybrid-fibre coaxial), fixed wireless (for example, satellite or digital microwave radio), or mobile broadband networks. The Commission regards fixed-line, fixed wireless and mobile broadband networks as PTNs (this is not in issue in the Case Stated). Broadband networks have a "return channel", allowing end-users to convey a signal to another person.

**Broadcasting as a telecommunication**

[53] Because it underpins an understanding of each of the questions, it is useful to first discuss why broadcasting may be a telecommunication and consequently why broadcasting services may be telecommunication services.

[54] As set out earlier, "telecommunications" is defined as meaning "*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" (my emphasis).[50]

[55] Broadcasting involves creating programmes, converting them into a signal that can be conveyed, transmission of the signal using radio waves (an electromagnetic wave), and reception by end-users. The transmission stage involves "the conveyance of signal by electromagnetic means". That transmission will be a "telecommunication" if the signal is conveyed "from one device to another … whether for the information of any person using the device or not".

[56] If a broadcasting transmission is a "telecommunication", then the provision of that transmission service will be a "telecommunication service" because it is a "service … that enables or facilitates telecommunication".[51]

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50 The term "device" is not defined in the Act. The term "telephone device" is used in the definition of a "public switched telephone network" (PSTN) and is defined as meaning "any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice frequency communication".

51 Section 5.

**Question one**

*Question and overview*

[57] Question one asks:

> If the public:
>
> (a) can receive a telecommunication (as defined in the Telecommunications Act) from a network; but
>
> (b) cannot send a telecommunication (as defined in the Telecommunications Act) through that network,
>
> is that network "used, or intended to be used, in whole or in part by the public for the purpose of telecommunication" as those words are used in the definition of a "public telecommunications network" (or PTN) in the Telecommunications Act?

[58] This question arises because the definitions of "liable person" and "qualified revenue" under the TDL regime are confined to telecommunication services provided by means of, or that rely primarily on, a PTN or some component thereof. A PTN is a network used or intended to be used by the public for the purposes of telecommunication.

[59] The issue is whether terrestrial or satellite transmission networks used for broadcasting are used or intended to be used by the public for the purposes of telecommunication given that they do not have a return channel (that is, that would allow an end-user to convey a sign, signal, writing, image, sound etc). The Commission contends that they are because a member of the public who receives the signal is using the network for the purpose of telecommunication. Sky and Kordia, supported by TVNZ, contend that they do not because the broadcasting transmission network is not accessible to the public and the signal is broadcast by others into free space.

*Submissions*

[60] The Commission's submission is premised on terrestrial and satellite broadcasting transmission involving a network. With terrestrial broadcasting, that network involves towers that transmit a signal into free space for reception by end-users via an antenna. With satellite broadcasting, that network involves the uplink,

satellite transponder, and downlink that transmit a signal received by end-users via their satellite dish.

[61] The Commission submits that the dictionary definition of "use" is to "avail oneself of". It submits the network is "used … by the public for the purpose of telecommunication" when the signal is received by an end-user's device (the antenna or the satellite dish) and they avail themselves of that signal.

[62] The Commission submits that the purpose of the requirement that the network be used by the public is to distinguish between networks that are used by the public from private networks (that is, networks that are not available to persons outside a specific or identifiable group). It submits that broadcasting is designed to be conveyed to the public and the broadcasting network is used by broadcasters to enable a signal to be conveyed to the public. It submits it would be an odd result if the public does not also "use" the network to receive the signal directed to them. It submits there is nothing in the definition of telecommunication that requires that a member of the public be able to initiate a telecommunication to "use" a network. It simply involves a conveyance from one device to another.

[63] It says the ordinary meaning of the word "use" can include "passive receipt" (that is, when the person does nothing to cause it to be received). For example, "I used the sun to heat the water" or "I used the wind to cool down". Similarly, it says that in the context of other networks (for example, an electricity lines network), it includes receipt of the thing conveyed by the network. The Commission says that all forms of telecommunication are in fact one-way in the sense that there is a conveyance of a signal from an initiating device to a receiving device (for example, a text message). It says that Parliament cannot have intended that a person uses a network when they send a message but not when they receive one.

[64] Sky, Kordia and TVNZ all submit that the satellite and terrestrial transmission as described in the Case Stated is one-way transmission from the broadcaster. They say that "telecommunication" involves "the conveyance … by one device to another". They say that the broadcaster's network is not "used … by the public for the purpose of telecommunication" because the public cannot convey any telecommunication (in

any of the communication forms) using that network. The public have no right to and cannot use the transmission infrastructure to communicate. Rather, the broadcaster continuously broadcasts the content into free space regardless, and customers merely receive the broadcast programmes via privately-owned end use or customer premises equipment.

[65] Sky elaborates on why a one-to-many broadcast over satellite or terrestrial infrastructure does not satisfy the requirements as follows:

(a) It does not amount to a "one device to another" communication "by the public". Instead the content is continuously broadcast by others into free space.

(b) The public has no access to the platform and cannot intentionally use it. Instead they have a broadcast receiving apparatus, being privately-owned end use or customer premises equipment that does not form part of any public network. Decryption or viewing of content by a member of the public is different from conveyance of signal.

(c) This means that end-users passively receive the signal and do not cause or initiate the broadcast in any way, and the network does not carry any sign, signal, impulse, image, or sound of any nature from the public.

(d) While the definition of PTN is inclusive, the two instances specified in that definition (namely, public telephone networks and public data networks) indicate the nature of the "use" envisaged by the definition.

[66] Sky and Kordia say their position is supported by the history and background. TVNZ submits there is no need to resort to the legislative history and other background materials because the meaning of "used … by the public for the purposes of telecommunication" is plain and unambiguous.

[67] Sky and Kordia submit that the legislative intention is to levy those who use and benefit from the public infrastructure that the levy funds.[52] Sky and Kordia submit that traditional broadcasting infrastructure platforms do not benefit from subsidised rural broadcast extensions (and face competition from providers of those services) and if providers of traditional broadcasting platforms are subject to a levy that funds such uses, there is a mismatch of the benefit and the burden and therefore an unfair cross-subsidy.

[68] Sky and Kordia submit that the legislative intent in removing the broadcasting exclusion from the "telecommunications" definition was to enable potential regulation of broadcasting in a converged world. It was not intended to impose a TDL levy on legacy infrastructure providing traditional broadcasting services. Rather, it was recognised that those traditional broadcasting services would face increasing competition from converged internet platforms. The legislative purpose was not to make the traditional broadcasting services (that use legacy infrastructure) fund purposes of no benefit to their end-users and thereby cross-subsidise the other telecommunication providers whose end-users do benefit from the fund.

[69] Sky, Kordia and TVNZ also say that their position is supported by the Court's decision in *REANNZ*.[53] Sky and Kordia submit that in that case the Court accepted that, in order for there to be a network "used … by the public for the purposes of telecommunication" there are two requirements: (1) there must be means by which a member of the public can feasibly obtain access to the network "to communicate with others", and (2) the use must be direct and intentional.

[70] The Commission responds that it cannot be assumed that the levy will not be used for services that are of benefit to end-users of terrestrial and satellite broadcasters. Section 90 is not so limited. The levy can be used for anything that may facilitate telecommunication services to end-users to whom those services may not otherwise

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52 For example, TDL funding could be earmarked for rural broadband extensions. The party who wins the tender to supply the infrastructure benefits but there are benefits to the industry as a whole because of the open access regime. The ubiquity of reach benefits all providers of services of that kind because their customers participate in this broader reach. A levy on those service providers matches the benefit and the burden and avoids non-providers of those services from cross-subsidising those who do.

53 *REANNZ*, above n 16, at [75]-[76].

be supplied on a commercial basis. The Commission also contends that Sky, Kordia and TVNZ have taken the statements made by the Court in *REANNZ* out of context.

*Analysis*

[71] Starting with the plain words of "a network used by … the public for the purposes of telecommunication", I agree with the Commission that the public uses a network if they avail themselves of it. That is, the public has used a network if they avail themselves of a telecommunications signal conveyed by that network.

[72] The somewhat more difficult issue is whether they have used the network "for the purposes of telecommunication". Importing the full definition of "telecommunication" into this phrase, they submit that the network must be used by the public for the purposes of "the conveyance by electromagnetic means from one device to another of any …. signal [etc] …". That is, for "the purposes of telecommunication" means the public must be doing (and able to do) the conveyance from one device to another. Put another way, they say that they are only using the network for the purposes of telecommunication if they have a device that initiates the conveying.

[73] I am not persuaded that this is the intended meaning of a PTN for the purposes of the "liable person" definition. That definition is concerned with the person who provides a telecommunication service. The requirement that the provider do so "by means of some component of a PTN" appears intended to capture only those providers of telecommunication services who provide that service by a public (rather than private) telecommunications network. The public is using the 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.

[74] I am also not persuaded that the legislative history and related background documents indicate any different intention. Certainly officials were initially unpersuaded that broadcasting required any new regulatory response as broadcasters were facing increasing competition due to convergence. Bearing in mind that the Act's two regulatory access regimes have in mind the purpose of promoting

telecommunication markets for the long-term benefit of end-users of telecommunication services, officials did not see a compelling case to bring broadcasting into the Act's regime at that stage.

[75] Two years later, however, when officials were considering the new fixed-fibre access regulatory regime proposed under the Bill, they became concerned about anomalies. With the accelerating use of and migration to broadband networks to provide broadcasting content, they considered that continuing to exclude traditional broadcasting services could be difficult to manage. Officials also saw potential benefit in increased scrutiny of traditional broadcasting distribution services. The Select Committee accepted the advice at least in relation to the potential for anomalies and that the broadcasting exclusion should be removed because of this. Knowing from the advice that there were traditional broadcasting services as well as converged platforms, it did not carve out traditional broadcasting services from the "telecommunication" definition. While the focus was the ability to regulate broadcasting, the Select Committee explicitly said that this could result in some entities having to pay levies.

[76] In making this change, nowhere in officials' advice nor the Select Committee reports nor elsewhere in the Parliamentary process that led to the 2018 amendment as enacted (as included in the information put forward to this Court), does it seem that concern was expressed that this would result in some broadcasters paying for a levy to fund services that would not benefit its end-users. Rather, it was simply recognised that some entities might now have to pay levies that previously they had not been required to. The one concern, raised late in the process, seems only to have been to exempt free-to-air broadcasters from the TDL regime. If there was consideration given to whether bringing traditional broadcasters into the TDL regime would give rise to inefficient cross-subsidies, I do not have the information before me about what views were taken about that. It is at least possible that it was thought that there might be purposes to which the TDL could be put that would benefit end-users of traditional broadcasters. I agree with the Commission that s 90 does not on its face preclude this.

[77] Does *REANNZ* hold otherwise? That case involved a network that REANNZ offered to its research and education members. This network:

(a) provided high speed bandwidth enabling its members to exchange information quickly between themselves (and their approved users) (this exchange of traffic between them never left the REANNZ network);

(b) in some situations, it enabled members of the public to access websites hosted by some REANNZ members and, when they did so, data was transmitted across REANNZ network; and

(c) provided connectivity to the internet if a member opted to have this.

[78] The Commission's view was that REANNZ was a liable person for the TDL levy. REANNZ successfully challenged that view. On that challenge, there were three issues:

(a) whether use by REANNZ members and approved users constituted use by the public;

(b) whether access by the (wider) public to websites that are hosted by REANNZ members and the transmission of data across the network constitutes use by the public; and

(c) whether the fact that the REANNZ network provided connectivity to the internet made REANNZ a liable person.

[79] On the first issue, the Court said that telecommunication services offered by the usual commercial network service providers were public because they were open to all, subject only to having the means to pay and entry into and complying with standard form contracts. In contrast, REANNZ was for use by, and access was limited to, a specific and identifiable group. That group was a defined class and REANNZ was required to approve membership to that group. This meant it was not a network that was "used by the public".[54]

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[54] At [74].

[80] The Court went on to say that this conclusion:

> [75] …is underscored by the fact that the REANNZ network is not physically accessible by members of the public generally. Only members (or their approved users) are able to physically access (and use) the REANNZ network and, as noted earlier, access is predicated on the member arranging a physical interconnection at one of the REANNZ Network's PoPs and funding the network connection from its site. There is no means by which a member of the public can feasibly obtain access to the REANNZ Network to communicate with other persons.

[81] On the second issue, the Court explained that this could arise by happenstance. The internet process was automated and designed to find the least congested pathway to the end recipient (here, the website hosted on REANNZ's network). The Judge considered that the routing of internet traffic over an interconnected network to reach its termination point "cannot constitute 'use' by the public of that network here". The Judge considered that "use" of the network "must mean direct and intentional use, not indirect and accidental use that is a consequence of happenstance". The Judge considered that intention was "inherent in the idea that the relevant use must be 'for the purpose' of telecommunication".[55]

[82] On the third issue, the Court held that the fact the REANNZ network provided connectivity to the internet did not make REANNZ a liable person. A network was only a PTN if the network itself could be used or was intended to be used by the public. A network's capability to connect to another network that is itself a PTN did not suffice. Such connectivity did not make an otherwise private network a "component of" that PTN. There was a clear demarcation between the REANNZ (private) network and the public network operated by third-party telecommunication providers.[56]

[83] Sky and Kordia rely on the statement that "[t]here is no means by which a member of the public can feasibly obtain access to the REANNZ Network to communicate with other persons" to say that a terrestrial or satellite broadcasting network is not a PTN because the public cannot obtain access to that network "to communicate" with others.[57] However, that statement was made in the context of a broadband network that was available for use only by REANNZ members. It

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55 At [76].
56 At [77] and [78].
57 At [75].

demonstrated that the network (in which members communicated with each other) was a network only for them (and approved users) and not available to the public generally. Not only could members of the public not gain access to the REANNZ network, members exchanging traffic on that network were not communicating with the public. It was a non-public network.

[84] Sky and Kordia also rely on the "direct and intentional use" comments made in the context of the second issue in *REANNZ*. The Judge was distinguishing that from "indirect and accidental use that is a consequence of happenstance" that occurred because of the automated internet process finding the least congested pathway. The fact that members of the public could access a website hosted on REANNZ and in that way indirectly use the REANNZ network did not convert a private network into a public one. The satellite and terrestrial broadcasting described in the Case Stated differs from the REANNZ network because it is intended by the service provider to reach end-users and for end-users to make use of that broadcast if and when they intentionally choose to do so.

[85] I therefore accept the Commission's submission that the statements from *REANNZ* relied on by Sky and Kordia do not really assist here. I also accept the Commission's submission that it does not matter that the signals are broadcast into free space. The purpose of that conveyance is to enable members of the public to access that broadcast (through their personally owned antenna and satellite dishes and their television sets). The broadcast intentionally reaches the public's equipment and the public intentionally make use of it.

[86] I accept Sky's submission that this may mean that providers of terrestrial and satellite broadcasts potentially may be levied for purposes for which they may derive no benefit. If this occurs, then this may run counter to the original intention that end-users who benefit from TSO obligations should pay for those obligations through charges passed on by their providers and that an element of cross-subsidy may arise. However, I do not have sufficient information to know whether this will occur or whether Sky's end-users will benefit from TSO obligations now or in the future. Regardless, the intention was to bring broadcasting services within the TDL regime except as expressly exempted by s 85A.

[87] I conclude that answer to Question 1 is yes.

**Question two**

*Question and overview*

[88] Question two asks:

> Is the operator of a satellite:
>
> (a) Positioned outside New Zealand; but
>
> (b) Transmitting any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature via radio waves from a transponder located aboard the satellite into New Zealand for receipt by end-users in New Zealand,
>
> Providing a "telecommunications service" in New Zealand for the purposes of the Telecommunications Act?

[89] If the answer to this question is "yes", the operator of such a satellite will be a "liable person" if the satellite is a component of a PTN (the answer to which is at least partly dependent on the answer to question 1). If the answer to this question is "no", the operator of such a satellite will not be subject to the TDL regime because it will not be a "liable person".

[90] The Commission submits the correct answer is "yes". It submits that, if the satellite is transmitting signals for receipt by end-users in New Zealand, it is providing a telecommunications service in New Zealand even though the satellite is outside of New Zealand. Optus, supported by Kordia, submit that the service provided by the satellite occurs outside of New Zealand and is therefore outside the jurisdiction of the Telecommunications Act.

*Submissions*

[91] Although the question is phrased in general terms, Optus is presently the only party that this question is directedly related to. Optus has therefore responded in terms of its own service. Counsel for Optus accepts that it provides a "telecommunications service". It accepts that transponder capacity service involves equipment that

facilitates telecommunication (that is, the transmission of signals).[58] It says, however, that its service is provided entirely outside of New Zealand.

[92] Optus considers it is necessary to focus on the nature of the service it supplies and who it supplies that to. The service is described as a transponder capacity service. As counsel for Optus put it, the transponder capacity service involves receiving the uplink signal, amplifying it to make it stronger, changing the frequencies so it does not interfere with other communications, pointing it at New Zealand and "off it goes". Once the signal leaves the transponder, its work is done because at this point Optus has no control over the signal and no ability to interfere with it. It says this is a service provided to Sky and Kordia and that service occurs on the satellite and outside of New Zealand.

[93] Optus acknowledges that the question does not ask whether the transponder capacity service is provided by means of a PTN. However, it submits that this provides relevant context to the jurisdiction question. It submits that the transponder capacity service is not a receipt service. It is not providing part of a "network". Rather, it is providing a piece of infrastructure for the broadcaster's network. Optus draws an analogy with a carriage service provided by a carrier by means of a road network. The operator of a toll road, that allows the carrier's passage on the road network, does not provide those services by means of the road network.

[94] Optus notes that end-users, who turn on their Sky decoder or who have antenna, do not acquire the transponder capacity services. Rather, the consequence of the service acquired by Sky and Kordia and provided out of New Zealand is that end-users receive the signal that enables them to access content. That is not a service to which Optus is a party. It says the fact that its service has a consequence in New Zealand is not sufficient to provide jurisdiction under the Telecommunications Act.

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[58] Counsel for Optus has a slightly different view from other parties about whether it is necessary to read the full definition of "telecommunication" into the definition of "telecommunications services" but for present purposes that is of no moment.

[95] The Commission submits where the satellite and its operator is located is irrelevant to whether the relevant telecommunications service is provided in New Zealand. It submits that a telecommunications service enables or facilitates a conveyance from one device to another. It submits that determining where a service is provided requires a focus on the nature of the claim being made and a recognition of relevant developments in globalisation and modern commerce.

[96] The Commission submits that Optus' submission relies on who it has a contractual relationship with. That is, because its contract is with Sky or Kordia, its service is provided to them and it is not involved in the conveyance to the public. It submits this is an artificial distinction. The focus must be on what a transponder capacity service actually provides. It submits that where the satellite operator is providing a service that enables or facilitates a conveyance that is directed towards and intended for receipt in New Zealand, then that satellite telecommunications service is provided in New Zealand for the purposes of the Telecommunications Act. It submits that receipt in New Zealand necessarily requires a signal to be sent into New Zealand airspace, and it would have no relevance unless it was directed towards and accessible by the public in New Zealand.

[97] Putting it another way, it says the demand arises from broadcasters, many of whom are in New Zealand, seeking to convey programmes to New Zealand end-users. The demand is derived from those end-users of broadcasting programmes. The signals are necessarily conveyed into New Zealand and the ability of the satellite operator to enable or facilitate a conveyance to New Zealand end-users is the essential feature of the service it provides.

[98] The Commission also says that Question 2 deliberately does not ask if Optus (or anyone for that matter) is a liable person. It therefore does not engage with whether Optus provides a telecommunications service by means of some component of a PTN. The Commission has not sought the Court's assistance on this question and its submissions therefore do not address it.

*Analysis*

[99] The starting point is to be clear on the legal position regarding when a New Zealand statute may have extraterritorial reach. This is discussed by the Supreme Court in *Poynter v Commerce Commission*.[59] There the Court was considering whether there was jurisdiction under the Commerce Act over the actions of a person in Sydney. The Commerce Commission alleged that some of the New Zealand defendants had met with this person in Sydney, where he had given them instructions relating to anti-competitive arrangements. He had not, however, engaged in any relevant acts in New Zealand and nor had he addressed any relevant correspondence to persons residing in New Zealand.

[100] In finding that the courts did not have jurisdiction over him, the Supreme Court agreed with the following "important" principle:[60]

> … The New Zealand legislature will be slow to assert jurisdiction over conduct occurring wholly outside New Zealand, even if that conduct has consequences within New Zealand. This is reflected in the presumption that statutes do not have extraterritorial effect except to the extent permitted by law …

[101] It also said:

> [36] *Bennion on Statutory Interpretation* states, as a general proposition, that an enactment is to be treated as not having extraterritorial effect unless a contrary intention appears and subject to any relevant rules of private international law. *Craies on Legislation* states, to the same effect, that, in the absence of contrary evidence, a legislative proposition is addressed to anyone who is within the territory to which the proposition extends. An enactment will generally apply to things done and people in the territory to which it extends, and no further. There is a presumption that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.
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> (footnotes omitted)

[102] Optus submits that these principles support its position. Its satellite is outside of New Zealand and it transmits a signal from outside of New Zealand. The conduct is all outside of New Zealand and the receipt here is merely a consequence of the

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59 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 2 NZLR 300.

60 At [30] and [31]; see also *Wing Hung Printing Company Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [28].

conduct. There is nothing in the Telecommunications Act that provides it with jurisdiction over this conduct.

[103] The Commission says its view is consistent with the way Courts have applied the territorial scope of other economic regulatory law in situations where a service or conduct spans space or time. It provides the following examples of cases where conduct originating out of New Zealand is received in New Zealand:

(a) *Commerce Commission v Visy*: concerning an email or telecommunications sent to New Zealand which were characterised as conduct occurring in New Zealand for the purposes of anti-competitive conduct in a New Zealand market under the Commerce Act 1986.[61]

(b) *Wing Hung v Saito*: accepting that alleged representations communicated and received by a person in New Zealand and relating to the supply and services in New Zealand were arguably representations made in New Zealand (under the Fair Trading Act 1986).[62]

(c) *Commerce Commission v Discount Premium Holidays*: accepting that representations in calls from Melbourne-based telemarketers could "properly be regarded as breaches of the [Fair Trading Act] occurring in New Zealand" where those calls were received by New Zealand consumers.[63]

[104] These cases are materially different. They are about where conduct occurred for the relevant cause of action under the relevant statute. The present case is about whether a party who is based out of New Zealand and who carries out activities outside of New Zealand is subject to the Telecommunications Act. If it is, it is potentially subject to regulation. It could also be a "liable person" to pay a levy under the Telecommunications Act to fund activities for the benefit of New Zealand

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61 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383.
62 *Wing Hung*, above n 60.
63 *Commerce Commission v Discount Premium Holidays Ltd* HC Auckland CIV-2007-404-6451, 16 November 2007 at [16].

telecommunication consumers. The Telecommunications Act imposes two requirements that make a person liable. One of those is that they carry out a telecommunications service in New Zealand (there being no extraterritorial provision in the Act and nothing to indicate an intended extraterritorial reach). The other is that they do so by means of a PTN.

[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.

[106] The Commission makes two alternative arguments. The first is that the signal originates and ends in New Zealand via the service provided by the satellite operator. It submits it would be artificial to conclude that the telecommunications service provided by the satellite operator is not provided in New Zealand, especially when the satellite is provided in space, where no country can claim sovereignty. I do not think this submission adds anything to the analysis. Either on the facts an operator provides a "telecommunications service" (as defined in the Telecommunications Act) in New Zealand or it does not. For the reasons discussed above I consider it does not.

[107] The second is that 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. However, these possibilities do not apply to Optus and Optus is the

only satellite operator that provides satellite services to New Zealand broadcasters. These possibilities do not help with whether Optus provides telecommunication services in New Zealand.

[108] I conclude that the answer to Question 2 is no. This answer assumes that the satellite operator's only involvement in the transmission of the signal for receipt by end-users in New Zealand occurs on the satellite.

**Question three**

*Question and overview*

[109] Question three asks:

> If a liable person earns revenue from supplying a "telecommunications service" (as defined in the Telecommunications Act) to a "broadcaster" (as defined in the Broadcasting Act) for the purpose of enabling that broadcaster to supply a broadcasting service to end-users free of charge, is that revenue received by that liable person "in relation to a broadcasting service that is supplied to end-users free of charge" for the purposes of s 85A(1)(a) of the Telecommunications Act?

[110] As set out in the Case Stated, broadcasting content is provided to end-users on both a paid and free-to-air basis. There are different models for the provision of broadcasting transmission services. Some transmission services are provided to free-to-air broadcasters on a paid basis, which the free-to-air broadcaster then uses to broadcast its content to end-users free of charge. For example, Kordia provides broadcasting transmission services to TVNZ (amongst others) in return for a fee. It is this model (that is, a transmission service for a fee, provided to a free-to-air broadcaster) that Question 3 is aimed at addressing.

[111] If the answer to Question 3 is "yes", the revenue that Kordia earns from supplying transmission services to free-to-air broadcasters would not be "qualified revenue" and would not fall within the TDL regime. If the answer is "no", it may be "qualified revenue" under the regime.

[112] The Commission considers the answer is "no". It submits the words "in relation to" in s 85A require that the broadcasting service supplied to end-users free of

charge must be provided by the liable person. Kordia and TVNZ advance the contrary view. They contend that the revenue earned from the provider of the transmission services is earned "in relation to a broadcasting service that is supplied to end-users free of charge" for the purposes of s 85A(1)(a).

*Submissions*

[113] The Commission submits that there is a distinction between the revenue earned from supplying a telecommunications service to a broadcaster and that broadcaster using that telecommunications service to supply a broadcasting service to end-users. It submits that s 85A(1)(a) applies to exclude revenue received by a broadcaster that supplies telecommunications services as part of a broadcasting service that it supplies to end-users free of charge. It submits that s 85A(1)(a) does not apply to exclude revenue where a liable person provides telecommunications services for a fee to a free-to-air broadcaster. In that case, the liable person is earning revenue derived from a service to a broadcaster for a fee. Kordia's provision of terrestrial and satellite transmission services to TVNZ is an example of this.

[114] The Commission submits Parliament intended s 85A(1)(a) to provide a limited exclusion. The TDL regime is designed to achieve a targeted levy on all users of telecommunications services provided via public networks. Parliament intended all users who might benefit from investments made from the TDL fund to contribute to it. The proxy for identifying beneficiaries is the revenue from telecommunication services earned by a liable person. Section 85A(1)(a) is the exception to this general rule.

[115] The Commission submits it would be anomalous for Parliament to introduce a wide exception to the general beneficiary pays principle without also limiting the uses to which the TDL could be applied (that is, to exclude uses that benefit free-to-air broadcasters). That is because it would mean that users of broadcasting transmission services could benefit from investments under s 90 but would not be required to contribute to the TDL fund.

[116] Kordia submits that the words in s 85A(1)(a) do not distinguish between the various stages in which a broadcasting service is supplied to end-users. It submits that

the answer to question 3 depends on the meaning of "broadcasting service". Kordia submits that a plain reading of the phrase "broadcasting service" in light of the definition of "broadcasting" suggests a service that comprises one or more actions or steps involved in sending audio, visual or audio-visual content by radio waves.[64] It submits that no part of this distinguishes a broadcasting company from any other person or entity involved in the steps that are required to transmit free-to-air radio wavers to end-users.

[117] Kordia says that it provides a broadcasting service as one of the parties involved in the steps that are required to transmit free-to-air radio waves to end-users. It undertakes the entire process of transmitting programmes to the public from the time Kordia receives programming content from broadcasting companies (such as TVNZ, RNZ, Discovery and Māori Television) all the way through to transmission of that content from Kordia's broadcast sites or the Optus transponder.

[118] Kordia submits that the next requirement under s 85A(1)(a) is that its broadcasting service be one "that is supplied to end-users free of charge". It says there does not appear to be any dispute that the television or radio channels transmitted by Kordia are received by the public without the need for them to purchase any subscription or pay any fee and so this requirement is satisfied.

[119] Kordia submits that the remaining element of s 85A(1)(a) is: "[a]ny amount of revenue received in relation to …" a broadcasting service that is supplied to end-users free of charge. It submits that a wide reading of "in relation to" is implied. It refers to the "any amount of revenue" wording when it could have said "any revenue". It also submits that the section does not incorporate any words that might narrow the revenue that is captured to a particular part of the supply of free-to-air programmes. It submits that all that is required here is a discernible link between the revenue Kordia receives and the transmission of free-to-air content that is supplied to the public. That link is present with Kordia's services.

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64 The Broadcasting Act 1989, s 2 defines "broadcasting" as "any transmission of programmes" and "programme" as meaning "sounds or visual images, or a combination of sounds and visual images, …".

[120] Kordia also submits that this interpretation is consistent with the legislative history. Free-to-air broadcasting was previously not subject to the TDL. When the exclusion of broadcasting was removed, this was to enable the potential regulation of broadcasting for anomalies that could arise in the future with anticipated convergence between these communication forms. Without s 85A, this would have made free-to-air broadcasting subject to the levy. Kordia would have become subject to the levy even though the levy could not be recovered from end-users. Kordia does not benefit from the uses to which the TDL is put and it does not provide the kind of services that were behind the rationale in bringing broadcasting services into the Telecommunications Act.

[121] TVNZ agrees with Kordia that its services fall within s 85A(1)(a). It says that if Kordia does not deliver its transmission services to TVNZ, TVNZ's content cannot be broadcast to end-users. That provides a sufficiently close connection to the broadcasting service that the free-to-air broadcaster is delivering to qualify as "in relation to".

[122] TVNZ submits that the Commission's interpretation would mean that the exclusion would apply to a free-to-air broadcaster who transmits its content, but not to a free-to-air broadcaster who outsources transmission to a third party. It submits that the Commission's interpretation would render the exclusion otiose as TVNZ does not transmit free-to-air programmes, but rather contracts with third parties (including Kordia) to provide that service. It says Parliament would have been aware of this, as Kordia and TVNZ are owned by the Crown.

[123] TVNZ emphasises that if Kordia were subject to the TDL regime then ultimately it would seek to recover that from TVNZ. Kordia confirms this (once the present long-term contracts have ended). TVNZ cannot charge end-users for this. The additional costs TVNZ will pay for the broadcasting service will need to be met from other sources of revenue (advertising, sponsorships and NZ On Air funding). This is inconsistent with the intention of the TDL regime to levy those who will pass on the cost to those who benefit from the services funded by it.

*Analysis*

[124] The Commission says that Kordia has sought to have the Court answer questions that are not part of the question as stated. Focussing on the question as framed, the question assumes two discrete services. There is a broadcasting service supplied by a broadcaster to end-users free of charge (the retail service). There is also a telecommunications service (which may also be a broadcasting service) supplied by the liable person to the broadcaster for the purpose of enabling that broadcaster to supply its retail service (the wholesale service). The question is whether "in relation to" covers the wholesale service supplied for a fee.

[125] The parties refer to case law that has considered "in relation to" and similar terms such as "in respect of", "in connection with" and "arising out of" that indicates that the nature of the required connection or nexus, be it close or a wider ambit, will ultimately turn on the object and purposes of the particular statutory provision.[65] The Commission submits a narrow interpretation of "in relation to" is supported from the use of "derived" in the example given in s 85A(1)(a). It also submits that s 85A(1)(b) indicates that s 85A(1)(a) was a narrower exception than any broadcast service. Kordia submits a wide interpretation is supported by the words "any revenue" and the absence of any words distinguishing between wholesaler and retailer. TVNZ submits the context supports a wide interpretation, bearing in mind that Kordia and TVNZ are both owned by the Crown, and TVNZ will bear the cost of the levy and cannot recover it from end-users contrary to the legislative intent.

[126] I consider that the respective interpretations advanced here are both arguable. I consider the Commission's analysis is arguably not the more natural meaning of the words of s 85A. The arguably more natural meaning is TVNZ's submission that Kordia's revenue from supplying a telecommunications service to it is revenue that is received by Kordia in relation to a broadcasting service that is supplied to end-users free of charge. I agree with TVNZ that if it was only intended to cover a retail broadcasting service supplied free of charge, more precise words could have been used. For example, it could have said "any amount of revenue that is received by a

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[65] Referring to *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2015] NZCA 78, [2015] 3 NZLR 191 at [52]; *IAG New Zealand Ltd v Jackson* [2013] NZCA 302 at [24].

liable person for a broadcasting service that is supplied by the liable person to end-users free of charge".

[127] The example set out in s 85A(1)(a) makes it clear that the retail service is within the exemption. However, it does not necessarily exclude a wholesaler's revenue because it can still be said that the wholesaler's revenue for its telecommunications service provided to the retailer is derived from a free-to-air service. Moreover, it is stated as an example and not as the only way revenue may be received "in relation to a broadcasting service that is supplied to end-users free of charge".

[128] In the context of a statutory regulatory scheme that involves the imposition of levies on a participant, it is for the Commission to show why its interpretation is the correct one, as against the arguably more natural meaning, in light of its context and purpose. The legislative history does not particularly assist with this. As discussed earlier, including "broadcasting" in the scope of the Act was not part of the Bill as introduced. It came out of officials' advice during the Select Committee stage. That advice was focussed on whether broadcasting should be subject to potential regulation under the Act. While it was recognised at the time that this might have implications for who was required to pay the levies, s 85A(1)(a) came later.

[129] The legislative materials do not assist with its envisaged scope. It is unclear whether a levy on the supplier of telecommunications services to a free-to-air broadcaster will fund things of benefit to the end-users receiving that service. However, the fact that the revenue the wholesaler receives from the retailer cannot be recovered from end-users provides some support for the interpretation advanced by TVNZ and Kordia. Its effect is to increase the cost of the delivery of free-to-air television, whether it is TVNZ or a third party that is providing the telecommunication services that enable free-to-air content to be delivered, without the ability to recoup that cost from end-users. This indicates the wider interpretation of "in relation to" is to be preferred.

[130] I conclude that the answer to Question 3 is yes.

Mallon J