

Notification of Potential Liability for the Telecommunications Development Levy 2012

Notice of persons potentially liable to contribute to the Telecommunications Development Levy made under Part 3 of the Telecommunications Act 2001.

The Commission:

Dr Stephen Gale

Anita Mazzoleni

Pat Duignan

Date of Decision: 24 July 2012

CONTENTS

List of defined terms and abbreviations	3
Executive summary	5
Purpose	7
Legislative background	7
Commission decisions on potentially liable persons	9
What is a telecommunications service?	11
Introduction	11
The definition of “telecommunications service”	11
Commission’s view on the definition of “telecommunications service”	12
What is a component of a PTN?	12
Introduction	12
Defining a component of a PTN	12
Commission’s view on the meaning of a component of a PTN	13
A public versus private demarcation point is still appropriate	14
What does it mean to operate a component of a PTN?	14
Introduction	14
Definition of “operates”	15
Commission’s decision on the meaning of “operates”	15
Content providers using CDNs	16
Chorus is liable	16
Introduction	16
Commission’s Decision	17
Who are the liable persons?	18
Next steps	20
Attachment 1 - Key points made in submissions to the Draft Notification	21
Attachment 2- Relevant statutory provisions	27
Attachment 3 – List of Liable Persons	34

List of defined terms and abbreviations

Act	means the Telecommunications Act 2001
Amendment Act	means the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011
CDN	content delivery network
Chorus	means Chorus New Zealand Ltd
Minimum telecommunications revenue	<p>is defined in section 80 of the Act as meaning \$10 million of gross revenue (as may be determined by any specifications set by the Commission) that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to a liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount):</p> <ul style="list-style-type: none"> (a) telecommunications services by means of its PTN; (b) telecommunications services by means that rely primarily on the existence of its PTN or any other PTN
PTN	means public telecommunications network, which is a network that is used by the public for the purpose of telecommunication, and includes a public switched telephone network and a public data network
RBI	means Rural Broadband Initiative. Telecom and Vodafone were awarded a tender in 2011 to provide broadband to much of rural New Zealand at prices and performance comparable to urban areas (as at the date of the tender)
TDL	means Telecommunications Development Levy
Telecom	means Telecom Corporation of New Zealand Limited and Telecom New Zealand Limited
Telecommunication	<p>means the conveyance by electromagnetic means from one device to another, of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not; and does not include any conveyance that constitutes broadcasting.</p>

Telecommunications service	means any goods, services, equipment, and facilities that enable or facilitate telecommunication
TSO	means Telecommunications Service Obligations in relation to a TSO instrument
Year A	means the financial year that is the subject of the liability allocation determination
Year prior to Year A	means the financial year preceding the year that is the subject of the liability allocation determination

Executive summary

1. This Notification identifies the service providers who are potentially “liable persons” for the purposes of the Telecommunications Development Levy (TDL) for the 2011/12 financial year (Year A).
2. Relevant service providers may be required to provide information to assist the Commerce Commission (Commission) in determining whether they meet the minimum telecommunications revenue threshold. This is based on revenue in the 2010/11 financial year.
3. Liable persons meeting the minimum telecommunications revenue threshold, and trading in the 2010/11 financial year, will be required to contribute to the TDL.
4. From 2011/12 onwards, service providers are liable to contribute to the TDL if they meet the revised definition for “liable person” in section 5 of the Telecommunications Act 2001 (the Act), traded in the preceding financial year, and earned more than the minimum telecommunications revenue of \$10 million in that preceding year.
5. In Attachment 3, we have listed all service providers that are known to do all of the following:
 - a. provide a telecommunications service, which may include the transmission of voice, data, SMS, or any other content, but does not include broadcasting (the transmission of programmes for reception by the public)
 - b. provide the telecommunications service in New Zealand
 - c. operate a component of the public telecommunications network (PTN) over which the telecommunications service is provided
 - d. operate a component of a PTN that falls on the public side of the network demarcation point
 - e. provide a telecommunications service that is publicly available.
6. The Commission considers that its interpretation of “liable person” is consistent with Option 3 adopted by the Ministry of Economic Development (MED) in its Regulatory Impact Statement (RIS), namely the status quo under the previous Telecommunications Service Obligations (TSO) liability allocation process, updated to include IP interconnection revenue.
7. We do not believe that the Act intended to bring about fundamental change by casting the TDL net broadly to include over-the-top content providers. Content providers do not, merely by allowing end-users to access their content and information (whether via on-premises servers or in a third-party hosting facility or cache), operate a component of a PTN. Our view of liable persons is consistent with the original intent of the TDL as outlined in the RIS.

8. Following the release of this Notification, the Commission will:
 - a. issue a Notice of Potential Liability under section 81 of the Act and request financial information for the 2010/11 financial (the year preceding financial year A), where it considers a service provider is a liable person but is not certain whether the \$10 million threshold was reached in the year prior to Year A
 - b. prepare draft instructions for calculating qualified revenue and issue these for consultation
 - c. issue a formal information request containing the instructions for calculating qualified revenue to all liable persons meeting the \$10 million threshold
 - d. issue a draft TDL liability allocation determination in accordance with section 84 of the Act, and invite submissions. The Commission may decide to hold a conference to consider submissions.
 - e. issue a final TDL liability allocation determination.

Purpose

10. This Notification provides the Commission's decisions on identifying the service providers who are potentially "liable persons" for the purposes of the TDL for the 2011/12 financial year (Year A). It also sets out the reasons for the Commission's decisions.
11. Relevant service providers may be required to provide information to assist the Commission in determining whether they meet the minimum telecommunications revenue threshold for the year prior to Year A, in this case the 2010/11 financial year.
12. Liable persons meeting the minimum telecommunications revenue threshold, and trading in the 2010/11 financial year, will be required to contribute to the TDL.
13. This Notification does not define "qualified revenue" or prescribe the Commission's criteria for assessing an eligible liable person's qualified revenue. Neither does it conclude whether a potentially liable person in fact derived telecommunications revenue of \$10 million or more from operating a component of its PTN. The Commission will assess these matters separately at a later date.

Legislative background

14. The TDL was introduced by the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 (Amendment Act). It replaces the TSO liability allocation process, and streamlines the process for industry contributions to government-led improvements to New Zealand's telecommunications infrastructure.
15. The explanatory notes at the beginning of the first draft of the Telecommunications (TSO, Broadband, and Other Matters) Bill (the Bill) explaining Part 1 (which covers the TDL and TSO amendments) includes the following:

The Bill—

...

streamlines the legislative funding mechanisms for TSO instruments by introducing a new Telecommunications Development Levy (the TDL), which will 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.

16. In the first reading of the Bill, Steven Joyce (Minister for Communications and Information Technology) summarised the relevant TDL changes as follows: ¹

The bill also implements the Government's telecommunications service obligation reforms. ...

The bill amends payment of compensation to a telecommunications service provider by requiring the Crown to pay compensation due to telecommunications

¹

See Hansard Debates, Volume 669.

service obligation providers as assessed by the Commission. That compensation is funded from a new levy called the telecommunications development levy. The annual amount to be collected for the telecommunications development levy is specified in the bill, and the money collected will first pay for any telecommunications service obligation charges, and then rural telecommunications infrastructure development and upgrades to the emergency-calling services.

17. The RIS is also useful to understanding the scope of the legislative changes introduced by the TDL. It concluded that:²

.... a supply-side levy should be the preferred option for funding subsidies within the telecommunications sector. The primary reasons for this decision were:

- a that it leveraged an established and generally accepted allocation and collection process (the TSO charge allocation regime in the Telecommunications Act 2001); and
- b that it appropriately provided for the allocation of the levy across the most direct beneficiaries of the funded activities.

18. From 2011/12 onwards, service providers are liable to contribute to the TDL if they meet the revised definition for “liable person” in section 5 of the Telecommunications Act 2001 (the Act), traded in the preceding financial year, and earned more than the minimum telecommunications revenue of \$10 million in that preceding year.

Consultation on draft Notification

19. The Commission released a *Draft Notification of Potential Liability for the Telecommunications Development Levy 2012* (the Draft Notification) on 19 April 2012, and invited submissions on the Draft.
20. Submissions were received from eight parties: Chorus, Telecom, Vodafone, 2degrees, TelstraClear, Vector, Kordia, and Baycity Communications. Cross-submissions were received from six parties: Chorus, Telecom, Vodafone, 2degrees, TelstraClear, and Southern Cross. Key points made in submissions are outlined in **Attachment 1** to this document.
21. The focus of the issues raised in these submissions related to the Commission’s interpretation of key terms introduced in the Amendment Act. The major issues raised in the submissions were whether:
- a. the Commission’s interpretation of “telecommunications service” was too broad and its interpretation of “component of a Public Telecommunications Network” too narrow
 - b. over-the-top providers, such as Skype, should be classified as liable persons that are eligible to contribute to the TDL

² Regulatory Impact Statement, ‘Reform of the Telecommunications Service Obligation Framework and Industry Levy Arrangements’, dated 23 November 2010, paragraph 81.

- c. Sky Television qualifies as a liable person that is eligible to contribute to the TDL
 - d. content delivery networks (CDNs) should be classified as components of a PTN
 - e. Chorus is a liable person that is eligible to contribute to the TDL.
22. Submitting parties were keen to ensure that a broad cross-section of the industry was identified as liable persons and the appropriate services were captured within the revenue threshold.
23. The Commission has considered all submissions in reaching its views on those parties included in this Notice. We have made only minor changes to our preliminary view. This Notification proceeds to further explain the reasons for the Commission's views.

Commission decisions on potentially liable persons

24. The Act defines liable person, as *"a person who provides a telecommunications service in New Zealand by means of some component of a PTN that is operated by the person"*.³ Those who the Commission considers meet the definition of "liable person" are referred throughout this Notification as 'potentially liable persons'.
25. In accordance with section 81 of the Act, a service provider that is a potentially liable person is liable to contribute to the TDL for Year A if it:
- a. was trading in the year prior to Year A; and
 - b. derived the minimum telecommunications revenue of \$10 million from operating a component of their PTN or any other PTN during the year prior to Year A.
26. A potentially liable person must therefore satisfy both the definition of liable person and the two requirements of section 81 of the Act to contribute to the TDL.

Commission's view on the meaning of liable person

27. A service provider is a potentially liable person for the purposes of the TDL if the service provider:
- a. provides a telecommunications service, which may include the transmission of voice, data, SMS, or any other content, but excludes broadcasting (ie, the transmission of programmes for the reception by the public)
 - b. provides the telecommunications service in New Zealand
 - c. operates a component of the PTN over which the telecommunications service is provided

³ Section 5 of the Act.

- d. operates a component of a PTN that falls within the public side of the network demarcation point – the component must be operated by the service provider, not a third party
 - e. operates a network that is publicly available ie, not limited to a private use
28. Liable parties include retail voice and broadband service providers (other than pure resellers), mobile voice operators, and internet service providers (ISP) (this group includes those previously captured by the TSO, plus VoIP operators and ISPs). In addition, wholesale service providers such as local access network or backhaul service providers, are liable persons. Pure resellers are not liable persons, as they do not operate a component of the PTN.
29. Providers of content services over the internet do not operate a component of a PTN merely by allowing end-users to access their content and information (whether via on-premises servers or in a third-party hosting facility or cache). They are liable only if they operate a component of the PTN over which the content is conveyed.
30. The Commission considers that its interpretation of “liable person” is consistent with the option adopted by the Ministry of Economic Development (MED) for the reasons in its RIS. Four options for allocating liability for the TDL were considered:⁴
- Option 1: connections per carrier
 - Option 2: wholesale (layer 2) revenue per carrier
 - Option 3: the status quo updated to include IP interconnection revenue
 - Option 4: the status quo updated to include IP interconnection and content revenue.
31. MED chose Option 3:⁵
- Option 3 would be the most appropriate definition of “liable person”. It appropriately updates the definition to include IP interconnection, while retaining a methodology that is widely understood by the parties. This would also require consequential amendment to the definition of “liable person’s TSO qualified revenue”.
32. The RIS makes it clear that the intent of the revisions to the Act were to make an incremental change to the services and parties liable to contribute to the TDL/TSO, rather than to introduce a fundamental restructuring of this levy. A broader reading (to include over-the-top content providers and others) as argued by some parties, would lead to a result contrary to that indicated in the policy documents that guided the amendments to the Act.

⁴ Regulatory Impact Statement, ‘Reform of the Telecommunications Service Obligation Framework and Industry Levy Arrangements’, dated 23 November 2010, at paragraph 213.

⁵ Regulatory Impact Statement, ‘Reform of the Telecommunications Service Obligation Framework and Industry Levy Arrangements’, dated 23 November 2010, at paragraph 220.

What is a telecommunications service?

Introduction

33. “Telecommunications service” is a term in the definition of “liable person”. The discussion in this Notification is primarily concerned with the identification of “liable persons” and is not concerned with any measure for determining “qualified revenue”. This will be dealt with later in the Commission’s process.
34. An issue raised by submitting parties was whether the Commission’s interpretation of “telecommunications service” was too broad. Telecom argued that taking a broad approach to “telecommunications service” would be inconsistent with the Commission’s narrow approach to defining a PTN that relies on technologies and demarcation points. Telecom said that there should be consistency between these two elements in order to avoid distortions between telecommunications providers and that a broad approach best meets the objectives of the Act. TelstraClear and Vodafone were also concerned that the Commission is trying to levy a wide range of revenues from a narrow range of industry participants.

The definition of “telecommunications service”

35. The Act defines telecommunications service as “any goods, services, equipment, and facilities that enable or facilitate telecommunication”. “Telecommunication”, which is referred to in the definition of “telecommunications service”, is defined as:
 - (a) 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; and
 - (b) for the purposes of subpart 2 of Part 4, includes any conveyance that constitutes broadcasting; but
 - (c) for all other purposes, does not include any conveyance that constitutes broadcasting.
36. “Telecommunication” is the conveyance between devices; “network” means a system comprising interconnected links to permit telecommunications. A “network” (a term used in the definition of “PTN”) is defined as “a system comprising telecommunications links to permit telecommunication”. The devices at the supplier end (a server or cable) and the devices at the receiving end (such as a telephone or personal computer) are not components of the network.
37. Broadcasting is a specific exemption in the definition of telecommunication service as indicated by subparagraph (c) above. “Broadcasting” is defined in the Broadcasting Act 1989 as:

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

38. “Broadcasting” is, therefore, the telecommunication of a specific kind of content (programmes) to a general audience – the public. By exclusion, “telecommunication” as used in the Act does not include the conveyance of programmes to the public, and a telecommunications service does not include any goods or services that enable or facilitate conveyance of programmes to the public.

Commission’s view on the definition of “telecommunications service”

- 39. The Commission’s view is that a “telecommunications service” includes any electromagnetic conveyance service, regardless of what is being conveyed (except broadcasting). The content of the signal is irrelevant in determining whether the conveyance of that signal is a telecommunications service. Accordingly, a telecommunications service may convey a range of services including data services, facsimile services, internet-based services, video-on-demand, and online gaming.
- 40. We agree with the view that there is a distinction in the Act between conveyance (a telecommunications service) and the content that is being conveyed (which is not a telecommunications service). However, the Commission will assess how to estimate revenue derived from access to telecommunications services (as opposed to revenue derived from the content itself) as part of its qualified revenue process.
- 41. This interpretation of telecommunications service is consistent with the Commission’s previous TSO cost allocation determinations, the purposes of the TDL, and the wording in the Act.

What is a component of a PTN?

Introduction

- 42. “Some component of a PTN” is part of the definition of “liable person”.
- 43. The main issue raised by submitting parties was whether the Commission’s interpretation of “some component of a PTN” was too narrow. In particular, Telecom, Vodafone, TelstraClear and 2degrees argued that the Commission was adopting a narrow interpretation of “some component of a PTN” which had the effect of excluding over-the-top providers.
- 44. Telecom and TelstraClear also considered that CDNs qualify as a component of the PTN, and therefore the operators of those CDNs should be liable persons. In addition, Telecom was concerned with the Commission’s approach to public versus private networks as it considered that there is no private part to a PTN.

Defining a component of a PTN

- 45. A PTN is defined in the Act as “a network used, or intended to be used, in whole or in part, by the public for the purpose of telecommunication and includes a public switched telecommunications network (PSTN) and a public data network (PDN).”

46. “PSTN”⁶ and “PDN”⁷ are both defined terms in section 5 of the Act. Both types of networks must be used, or intended for use, by the public.
47. A “network” (a term used in the definition of “PTN”) is defined as “a system comprising telecommunications links to permit telecommunication”. A “telecommunications link” means any line, radio frequency, or other medium used for telecommunication. “Comprising” means “include, contain, especially as making up the whole; extend to, encompass; consist of, be made up of”. Therefore, “comprising telecommunications links” means including, encompassing and extending to cover telecommunication links.
48. A “component” of a PTN is not given a definition in the Act. “Component” is defined in the Shorter Oxford English Dictionary as a constituent part (of a larger whole).⁸

Commission’s view on the meaning of a component of a PTN

49. The purpose of the Amendment Act was to take account of technological changes in the industry. With technological developments, a PSTN based levy would eventually become obsolete and unfairly skew the levy towards providers using older technology. Including PDNs and other PTNs made the levy technology neutral and more future-proof. The aim of the TDL legislative changes was not to extend the pool of liable persons to include persons who did not operate network components, but was to capture a wider range of technology, which may or may not have the effect of increasing the number of liable persons.
50. The RIS on the TDL stated:⁹

The new industry levy would be recovered by service providers on the same basis as TSO levies are currently recovered (that is, based on relative revenues), but using amended definitions of the terms “liable person” and “TSO-qualified liable revenue” to further ensure technology independence. In effect the new industry levy would subsume the existing TSO levies and consolidate levy funding for telecommunications subsidisation into a single levy.

The implementation of these policy recommendations will require some legislative amendments. In particular:

- a the Telecommunications Act 2001 would be amended to provide for the imposition of a levy (the TDL), to be collected from liable persons in accordance with the current cost allocation determination process, and to be used for the purposes of funding TSO charges, emergency call system upgrades and rural telecommunications infrastructure development.

⁶ A “PSTN” or “public switched telecommunications network” is defined in section 5 as a “a dial-up telephone network used, or intended for use, in whole or in part, by the public for the purposes of providing telecommunication between devices”.

⁷ A “PDN” or “public data network” is defined in section 5 as “a data network used, or intended for use, in whole or in part, by the public”.

⁸ The only other reference in the Act where a reference is made to “some component of a PTN” is with respect to the description of “eligible person” in clause 4(4) of the Part 1 of Schedule 2 of the Act.

⁹ Regulatory Impact Statement, ‘Reform of the Telecommunications Service Obligation Framework and Industry Levy Arrangements’, dated 23 November 2010.

- b the “liable person” and “liable person’s TSO qualified revenue” definitions in the Act would be amended to keep pace with technological developments, specifically the transition to IP interconnection.

51. The Commission’s approach is based on the plain meaning of the Act and meets the purposes of the TDL.

A public versus private demarcation point is still appropriate

52. While some submitters have taken issue with the Commission’s preliminary view that there are public and private aspects of a PTN, 2degrees, Vodafone, TelstraClear, Chorus and Telecom acknowledge that there must be a demarcation point between those components that are part of a PTN and those that are not.
53. Given that there is a demarcation point, a PTN must be on the public side of the network. Therefore, the Commission remains of the view that the telecommunications infrastructure used to convey signals is the public part of the network, but the devices end-users use to connect to the PTN (eg a telephone, laptop or server) are private.
54. To illustrate the point made above, the customer premises equipment (CPE) is located on the private side of a network (it needs to be connected to the PTN in order for the end-user to obtain telecommunications services), but the CPE itself is not a “component of a PTN” as it is not a component of the public network. To interpret otherwise would be to conclude that anyone who owns a phone, computer, server or facsimile machine would be potentially liable for the TDL.
55. In addition, the use of the network must not be private to a single party, but available to the general public. Networks used by emergency services are clearly not intended for use by the public, and are therefore not PTNs. There must be means by which a member of the public (used in a broad sense, but not necessarily including every possible member of the public) can in practice obtain access to the network and use it to communicate with other persons.
56. Consequently, equipment in private networks that enables an end-user to make use of a PTN (whether it be an individual, a web site or a content provider) is not a component of the PTN. Telephones, fax machines, personal wi-fi hotspots, web servers, or networks of content servers, are not components of a PTN.
57. The servers used by over-the-top service providers are private assets and not components of a PTN. A cache holding third party content merely provides a point of entry and exit to the PTN for content, which is then conveyed by the operator of the PTN to the end-user.

What does it mean to operate a component of a PTN?

Introduction

58. Having defined what a component of a PTN is, the next critical interpretation is determining what constitutes “operated”. The context is the legislative reference to a “person who provides a telecommunications service in New Zealand by means of some component of a PTN that is *operated* by that person.”

Definition of “operates”

59. The Act does not define “operates”. However, the Shorter Oxford English Dictionary defines operates as to “exercise influence; produce an effect; and carry on commercial, professional, etc, activities; produce the intended effect; be in action; be functioning”. This definition does not limit operation of a network to “ownership” of network infrastructure.

Commission’s decision on the meaning of “operates”

60. In the TSO determinations the Commission said that the “network operator interconnecting with Telecom must either own or lease the network or otherwise have that network under its control.”¹⁰ The Commission remains of the view that the TSO meaning of “operates” should apply in relation to the TDL. For the purposes of the definition of “liable person”, a person “operates” a network where that party owns or leases a component of the PTN or has it under its control.
61. There is no ‘bright-line’ test for the meaning of control and a case-by-case assessment of each situation is required. The Commission has decided that ‘control’ does not extend to cover setting specific service levels in contracts for network delivery. Therefore, where a party has performance and service levels in its contract with a network provider, that is not sufficient in itself to qualify it as operating a component of a PTN.
62. The Commission considers that a person operates a component of the PTN where the person does one or more of the following:
- a. owns the component or has rights similar to ownership, such as a long-term lease, or exclusive licence, or
 - b. has a right to exclude use of the component by other parties , or
 - c. can authorise third-party use of, and access to, the component to provide a telecommunications service.
63. The Commission also considers that a piece of property that supports telecommunications infrastructure would not be caught by this definition of “operates a component of the PTN”. The Commission considers that the property must have been installed or erected for the purpose of telecommunications. This means that it must be operated, at least in part, *for the purpose of providing telecommunications services*. Incidental use by a telecommunications service provider, such as in leasing building space for a wireless cell site, is not sufficient for a person to be considered to be operating a component of a PTN.
64. The mere ability to locate telecommunications network equipment on real property does not itself mean that the owner or lessor of the real property is operating a component of a PTN. In contrast, a pole or attachment may be operated by the service provider that installed that telecommunications network.

¹⁰ Final TSO Cost Allocation Determination for period 1 July 2009 to 30 June 2010 at paragraph 44.

65. Parties providing pole attachment space for telecommunications services are “operating” a component of a public network, and are therefore potentially liable persons. From an engineering and costing perspective, the pole attachment space is generally thought of as part of the network, as is for example, a duct. The service provided is captured within the definition of telecommunications service and is a service that is provided by means of some component of the PTN.
66. The Commission recognises that in some cases the pole provider may also use the pole as a component of another network, (eg, an electricity network), and therefore some allocation may be necessary in order to recognise the dual functionality of the pole. The Commission’s view is that this allocation would be accommodated through the qualified revenue process.
67. TelstraClear argued that the criteria for the operation of a PTN do not necessarily mean that mobile virtual network operators (MVNOs) are captured. The Commission considers that MVNOs can be pure resellers of mobile services or they may operate a component of a network, such as a switch. Whether an MVNO operates a component of a PTN within the meaning of the Act will be a question of fact.
68. The Commission also considers that a person operating a mobile radio service is operating a component of the PTN, and would therefore qualify as a potentially liable person under the Act.

Content providers using CDNs

69. The Commission considers that in normal circumstances use of a CDN by a content provider will not, on its own, give rise to liability for that content provider.
70. CDNs can be described as ‘smart’ caches that store data and assist its delivery to end-users by making requests of the telecommunications network. CDNs are a series of interconnected caches that enable content to be delivered faster, in part by influencing the performance of the network. In the Commission’s view this does not constitute control of the network because the ‘influence’ exerted on the network by the CDN is limited to requests that are then processed by the network in accordance with its own specifications.
71. Although CDNs are served by the telecommunications network, they do not control it and therefore we do not consider the owner of a CDN operates a “public telecommunications network”, within the meaning of the Act.

Chorus is liable

Introduction

72. A key issue that arose from submissions is whether Chorus New Zealand Limited (Chorus) is a liable person. Of the submissions received, TelstraClear, Telecom, Vodafone, Kordia, Vector and 2degrees agreed with the Commission’s preliminary view that Chorus is a liable person. In contrast, Chorus disagreed with the Commission’s preliminary view.

Commission's Decision

73. The Commission continues to consider that Chorus was for the purposes of section 81 of the Act effectively trading in the 2010/11 financial year for the reasons outlined below. Chorus is liable because it was trading in the year prior to Year A.
74. Chorus argued that the Commission must concentrate on the legal form of Chorus and that this approach is required by section 81(1)(a) of the Act. We take a different view to Chorus because the legislative emphasis in section 81 is not on the legal form of the person trading; our view is that section 81(1)(a) requires the Commission to look at the 'substance' of the governance and trading arrangements for Chorus between financial year A and the prior year, rather than the legal form.
75. A review of the substance of Chorus' governance and trading arrangements indicates that there was continuity of Chorus as a legal person between financial year A (the 2011/12 financial year) and the year prior.
76. Whilst the ownership structure changed for Chorus, the same "liable person" underpinned the trading relationships when considered against the substance of those arrangements. Therefore, Chorus was trading in the year prior to financial year A, although as the Chorus Business Unit and the Telecom Wholesale Business Unit under Operational Separation.
77. The Chorus Business Unit was trading as part of Telecom and did not need independent legal capacity as contended by Chorus. The Chorus Business Unit was empowered, capable, and indeed obliged to act as if it was a separate person from Telecom. Chorus New Zealand Limited assumed the contractual role carried out by the Chorus Business Unit and, therefore, Chorus New Zealand Limited can be classified as trading in the year prior to Year A.
78. Chorus argued that the fundamental structure of decision-making for Chorus New Zealand is different from that of the Chorus Business Unit. The Chorus Business Unit reported to Telecom, whereas Chorus New Zealand Limited does not. In our view, the absence of continuity in ownership and decision-making structures between Chorus New Zealand Limited and the Chorus Business Unit is not material to determining Chorus' eligibility to contribute to the TDL. Section 81(1)(a) does not apply where trading relationships in the financial year preceding Year A can be located and attributed to the liable person, (as is the case for Chorus New Zealand Limited).
79. We consider that Chorus was "trading" for the purposes of section 81(1) in the 2010/11 financial year. That Chorus New Zealand Limited assumed the role of the Chorus Business Unit plus other assets, is supported by the fact that Chorus became the access provider of many of the designated services listed in Schedule 1 of the Act, and the definition of "ChorusCo"¹¹ in section 69B of the Act.

¹¹ The definition of ChorusCo states that "ChorusCo means the company that is to be demerged from Telecom on separation day in accordance with the demerger arrangement."

80. A finding that Chorus is eligible to contribute to the TDL is consistent with the purposes of section 79 of the Act, which were designed to ensure that telecommunications service providers were not excluded from obligations under Part 3 of the Act simply because of the structure they had adopted.
81. Foreclosing liability for companies that go through a major change in corporate form but are continuing to provide telecommunications services and earn telecommunications revenue would lead to outcomes not intended by section 79 of the Act, and would create substantial uncertainty for parties regarding their potential liability.
82. We agree with Vodafone that the purpose of section 81(1)(a) appears to be directed at enabling new entrants a year's 'breathing space' before they are liable for levies, and that the purpose of section 81(1)(b) is to exclude small providers earning less than \$10 million from the levy obligations. Chorus is neither a new entrant nor a small provider.
83. The TDL is paid by service providers with legacy networks and operations. Chorus holds these legacy assets. The Explanatory Note to the first Draft of the Telecommunications (TSO, Broadband and Other Matters) Amendment Bill stated that:

The Bill –

...

Streamlines the legislative funding mechanisms for TSO instruments by introducing a new Telecommunications Development Levy (the TDL), which will 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.
84. Therefore, the Commission concludes that Chorus qualifies as a potentially liable person that is eligible to contribute to the TDL in 2011/12.

Who are the liable persons?

85. The Commission has not been persuaded to alter its earlier interpretation of the statutory criteria for identifying potentially liable persons. However, several providers potentially meeting the criteria were not included on the draft list of liable persons.
86. A revised List of Liable Persons is provided as **Attachment 3**. This includes network operators, access seekers and access providers under the Act, local fibre companies, other persons listed on Chorus' Register of Non-retail Users and other parties that meet the criteria. The Commission is satisfied that the service providers currently listed in Attachment 3 are potentially liable persons within the meaning of the Act.
87. Telecom, Chorus and Vodafone suggested that the list of liable persons should be reviewed annually. The Commission accepts that annual reviews of the List of Liable Persons will be required and will rely on the exercise of its market monitoring

powers in updating this List. The current List of Liable Persons will be updated if the Commission becomes aware of additional liable persons.

88. The List of Liable Persons does not include over-the-top providers, such as Skype. We do not consider that Skype is liable because it does not appear to operate a component of a PTN in New Zealand.
89. Sky uses a CDN to provide video-on-demand services in addition to operating its broader broadcasting network. The Commission does not consider that Sky currently meets the liable person criteria, as Sky has asserted it does not provide the service through a component of a PTN operated by SKY.¹² According to Sky, the CDN that is used to provide the iSky video-on-demand services is instead operated by Orcon.¹³
90. The Commission continues to consider that the provision of international connectivity by itself is not the provision of a telecommunications service in New Zealand. The Commission agrees with Southern Cross that it is not a liable person. Given the Commission does not consider Southern Cross to be providing a telecommunications service in New Zealand, it does not need to consider Southern Cross' arguments that it is not operating a component of a PTN.

Other liable persons – the self-assessment requirements under sections 82 and 83 of the Act

91. While the Commission has attempted to identify all potentially liable persons using a variety of sources, liability arises under sections 82 and 83 of the Act regardless of whether the Commission has issued a determination that a party is a liable person within the meaning of the Act. Parties that fail to provide the required information in accordance with sections 82 and 83 may be the subject of enforcement action in accordance with Part 4A of the Act.¹⁴ Therefore, service providers should perform a self-assessment against the requirements for liability set out in the Act, and notify the Commission if they think they may be potentially liable.
92. As advised previously, for the 2011/12 year, the Commission accepts that potentially liable persons will have a reason for not providing the financial information required under section 82 of the Act by the time specified.¹⁵ This is because the Commission is not able, within the time set out in section 82, to identify all potentially liable persons that would be required to provide information under this provision. The Commission will request appropriate financial information where necessary (under either section 81 of the Telecommunications Act or section 98 of the Commerce Act¹⁶) now that potentially liable persons have been identified. Where it is already clear that a potentially liable person meets the financial threshold for TDL liability, the Commission will merely confirm that it considers the person to be liable for the 2011/12 year.

¹² Submission of Sky Network Television Limited, 24 Feb. 2012, para. 2.20.

¹³ Ibid, at 2.21.

¹⁴ See, specifically, clauses 156A(j) and (k) of Part 4A of the Act.

¹⁵ See, specifically, clauses 156A(j) and (k) of Part 4A of the Act.

¹⁶ Section 98 of the Commerce Act 1986 is an available power due to section 15(f) of the Telecommunications Act

Next steps

93. Following the release of this Notification, the Commission will undertake the following:
- a. issue a Notice of Potential Liability under section 81 of the Act and request financial information for the 2010/11 financial (the year preceding financial year A), where it considers a service provider is a liable person but is not certain whether the \$10 million threshold was reached in the year prior to Year A
 - b. prepare draft instructions for calculating qualified revenue and issue these for consultation
 - c. issue a formal information request containing the instructions for calculating qualified revenue to all liable persons meeting the \$10 million threshold
 - d. issue a Draft TDL Liability Allocation Determination in accordance with section 84 of the Act, and invite submissions. The Commission may decide to hold a conference to consider submissions, and
 - e. issue a final TDL Liability Allocation Determination.



Stephen Gale, *Telecommunications Commissioner*

Dated at Wellington this 24 day of July 2012.

COMMERCE COMMISSION

Attachment 1 - Key points made in submissions to the Draft Notification

Submissions on the meaning of “a liable person”

1. There was general acceptance of the Commission’s approach to defining liable persons amongst submitters. 2degrees supported the Draft Notification and agreed with the definition of liable person. TelstraClear and Vodafone thought the list of liable persons was appropriate, although both put forward arguments supporting expanding the pool of potentially liable persons.
2. Most parties agreed with the Commission’s position on Chorus’ liability for the 2011/12 financial year, with the notable exception being Chorus. Where submitters critiqued the Draft Notification, it related to the interpretations the Commission adopted in the document rather than the purpose or intent of the Draft Notification. A primary concern was ensuring that the Commission captured all parties that should attract liability.

Capturing over-the-top providers

3. Telecom, TelstraClear, Vodafone, 2degrees and BayCity Communications (BCL) expressed a concern that over-the-top providers (including Sky and Skype) had not been included in the Draft Notification as potentially liable persons. There was concern that the Commission’s interpretation of “operating a component of a PTN”, would narrow the pool of potentially liable persons.
4. It was argued that a narrow interpretation of “operating a component of a PTN” in combination with a broad interpretation of “a telecommunications service” would create an environment where a small group would be required to pay the full TDL based on the fact that they provide a large number of captured services. Over-the-top providers would then have an unfair advantage over their competitors, who would include TDL liable telecommunication providers delivering the same services.

Parliament’s intent and statutory requirements

5. Vodafone argued that the purpose of the TDL was to extend the base of parties contributing to the levy, but the Commission’s approach focused on continuing to levy the parties who were liable for the TSO under the previous regime. As these parties are also the primary investors in infrastructure and new technology, it was argued the Commission’s approach would create perverse incentives limiting investment and penalising investors. Vodafone suggested this could not have been Parliament’s intent.
6. Vodafone and TelstraClear argued that if the Commission adopted a narrow interpretation of liable persons and a broad interpretation of telecommunications service, the market would be distorted because over-the-top providers would be given an unfair advantage. Vodafone considered that the Commission should not adopt an approach that would produce such a market distortion, as it was required to maintain market neutrality.

Considering the content of submissions

7. Telecom, Vodafone, TelstraClear and 2degrees submitted that the Commission had adopted a broad interpretation of “telecommunications service” and a narrow interpretation of “operating a component of a PTN” (which narrows the definition of a liable person). These submitters expressed concern that an unfair imbalance would be created by the narrow application of the levy to domestic operators in a domestic market that is saturated with offshore competitors.
8. In particular, TelstraClear and Vodafone argued that if the Commission adopted a broad definition of a “telecommunications service” then the Commission needed to broaden its view of the definition of “liable persons” in a similar manner.

Submissions on the definition of “a telecommunications service”

9. In its submission, Telecom agreed with the Commission’s interpretation that “telecommunications service” includes PSTN and PDN based services.
10. TelstraClear and Vodafone argued that the Commission’s interpretation captured a number of services such as online gaming and video-on-demand, but only if they were provided by PTN component operators. They said that the Commission’s “broad service/narrow operator” approach meant such services were excluded from TDL eligibility if they were provided by a provider that was not operating a component of a PTN. According to TelstraClear and Vodafone, this approach gives rise to an unnecessary competitive distortion which should be avoided, as it forecloses access to markets for the parties who possess no market power against incumbent content providers.
11. The parties’ key concern is that the approach taken by the Commission will produce a serious competitive imbalance in some markets, as some providers determined to be operating a component of a PTN will be levied for providing data application services such as video-on-demand, online entertainment and education applications. However other providers not determined to be operating a component of a PTN may provide the same services free of any levy.
12. Vodafone advocated that the Commission reconsider TelstraClear’s proposal to separate content from carriage, such as is done in Australia for a carriers’ Universal Service Obligation. Vodafone and TelstraClear suggested that including only carriage services in the definition of “telecommunications service” would narrow the potential revenue captured, more fairly apportioning the levy. It would also better reflect the specific wording in the definitions of “telecommunication” and “telecommunications service” in the legislation, which they argued was limited to infrastructure and conveyance mechanisms – not content.
13. TelstraClear’s original submission to the Discussion Document in February 2012 recommended that there should be a distinction between the carriage or conveyance of content and the content itself.¹⁷ TelstraClear said that its position was

¹⁷ TelstraClear’s submission dated 24 February 2012, pp 7-8.

supported by Australian authority¹⁸ which draws a distinction between the means of conveyance and the content. TelstraClear submitted the definition of ‘carriage service’, a defined term in Australia which excludes the content, was broadly analogous to the definitions of ‘telecommunications service’ and ‘telecommunication’ in the Act, if combined together.

14. In reply, Telecom submitted that the approach proposed by TelstraClear might be appropriate in the Australian context but is not appropriate in New Zealand.¹⁹ Telecom disagreed that “carriage service” is broadly analogous to the definitions in the Act. Telecom said that the Australian legislation has a narrower definition of a “carriage service” because it separates the definitions for ‘carriage’ and ‘content’, which is not supported by New Zealand’s legislation.

Submissions on the meaning of “a component of a PTN”

15. Telecom, Vodafone, TelstraClear and 2degrees argued that the Commission was adopting a narrow interpretation of ‘component of a PTN’.
16. Telecom and TelstraClear submitted that CDNs were part of the network as they assist in maintaining the PTN’s optimal performance, and were more than merely serving as a data storage facility or ‘dumb cache’. In its cross-submission 2degrees agreed with this position.
17. TelstraClear stated in relation to CDNs:

“They are not simply “buckets” from which content is serviced as required. Instead, they are closely integrated into the network to allow for the optimisation of delivery of the content over that network.”²⁰

“It is an integral component of managing the load on their public network, ensuring that they are able to present an acceptable experience in content consumption to consumers.”²¹
18. Many submitters disagreed with the Commission’s approach to public and private sides of a PTN. Telecom considered that there is no private part to a PTN; by definition it is all public. They also thought that the Commission had taken a narrow approach to the definition of “network” by overlooking that a network is a ‘system’ comprising telecommunications links and ‘system’ must be more broadly understood and includes all components necessary to provide the service.
19. Furthermore, Telecom and Chorus argued that new technology and facilities (such as cloud computing) meant the Commission needed to be more specific about the demarcation point.
20. It was argued that distinguishing the demarcation point was necessary to ensure over-the-top providers were captured. If over-the-top providers are not captured, a

¹⁸ *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 555; [2000] FCA 1161.

¹⁹ Telecom’s cross-submission dated 2 March 2012, pp 3- 4.

²⁰ TCL submission p3, para 11.

²¹ TCL submission p4, para 14.

narrow group of service providers (with infrastructure interests) would be required to pay the levy.

21. As many service providers were also content providers it was submitted they would be required to pay the levy on services that when provided by competitors would not be liable, and consequently the market would be distorted with many telecommunications companies unfairly discriminated against.

Submissions on “operated by the person”

22. Many parties interpreted the ‘material control’ criterion very broadly. TelstraClear and Telecom considered, for example, that Sky would have service level agreements with detailed performance measures that would constitute ‘material control’ over a component of a PTN.
23. Vodafone said that a party may have sufficient control of infrastructure necessary to ensure content-type telecommunications services are delivered with sufficient service quality as sufficient control to be found to be operating a component of a PTN.
24. Vodafone also submitted that the overriding imperative for the Commission (including with respect to the “operates” component of the definition of liable person) is to ensure consistency within its criteria so that it does not unfairly prejudice any particular person from competing and innovating without competitive distortions.
25. TelstraClear also argued that Skype would operate a software switch, and that would constitute ‘material control’ over a component of a PTN. It argued that even though the switch would be operated off-shore, the service would still be delivered in New Zealand, and should therefore be captured.
26. TelstraClear argued that its MVNO is not covered within the definition as they do not have the requisite control over Vodafone’s mobile network.

Submissions on whether Chorus is a liable person

27. TelstraClear, Vodafone, 2degrees Vector and Kordia agreed with the Commission’s position that Chorus is liable for the 2011/12 year. Telecom indicated the Commission’s position is legitimate. Only Chorus opposed the Commission’s approach.
28. Chorus’ argument is that the new legal entity “Chorus” did not exist until incorporated and that the Chorus Business Unit cannot be a legal person for the purposes of section 81 of the Act. Furthermore, Chorus said that new Chorus operates very differently from old Chorus in relation to its governance, incorporation, asset base and service delivery. Chorus set out some facts in an Appendix to its submission which explained the corporate form and structure of Chorus and of Telecom prior to structural separation. Chorus contended that this indicated that Chorus New Zealand Limited was created as a new person distinct from both Telecom and any previously existing unit within Telecom.

29. Chorus stated that the Operational Separation Undertakings recognised that whilst the Chorus Business Unit engaged in trade, binding legal rights and obligations were only created in favour of the separate legal entity that was then constituted as Telecom.
30. Chorus challenged the Commission's assertion that because Chorus was unincorporated it could be considered to be a legal person independent of Telecom. The fact that Chorus was unincorporated in the 2010/11 financial year does not necessarily mean that it was a person as it was a business unit of a larger company that owned all its assets and outputs.
31. Chorus considered that treating a business unit of a company as a separate person is inconsistent with section 79 of the Act, which requires the Commission to treat related companies as a single person for TDL allocation purposes.
32. Chorus's view was that the legal person in section 81 should be interpreted consistently with the principles which recognise corporate form and structure, ie, the law of business associations. According to Chorus, the application of these principles logically leads to the conclusion that Chorus New Zealand Limited as a body constituted on 1 July 2011 was not trading in the 2010/11 year and, therefore, is excluded from liability for the TDL.
33. Finally, Chorus argued that the wording of section 81 is clear and unambiguous and should be applied, and there are no grounds to apply a purposive interpretation (such as suggested by the Commission) of s81.
34. TelstraClear submitted that changes in the management, ownership or business of an entity, as occurred for the Chorus Business Unit, does not render that entity a different "person". An incorporated company may undergo drastic change over the course of its corporate life, yet will undoubtedly be the same legal "person".
35. TelstraClear said that there was a seamless transition in wholesale arrangements between access seekers and the Chorus Business Unit and Chorus. Chorus continued to acquire services under exactly the same agreements and contractual terms, and without any formal reassignment of these wholesale agreements.
36. TelstraClear referred to the Scheme Booklet and the Independent Expert's Report which illustrated that Telecom and Chorus themselves considers Chorus to be a continuation of the separate Chorus Business Unit entity. TelstraClear also noted that Chorus' shareholding was, at least initially, substantially the same as that of Telecom. Telecom's shareholders were issued with shares in Chorus in proportion to their Telecom shareholding. According to TelstraClear, incorporation therefore made no difference to Chorus' ownership, and any divergence in ownership over time cannot possibly render Chorus a different "person".

Submissions on identifying liable persons

37. Telecom, Chorus and Vodafone suggested that the list of liable persons should be reviewed every year.

38. TelstraClear, 2degrees, BCL, Telecom, Vodafone indicated that the Commission should relook at capturing over-the-top providers, and use its section 98 powers under the Commerce Act to look at the relationship over-the-top providers have with the providers of the components of the PTN they use to deliver their services.
39. 2degrees reiterated the suggestion it raised in its submission to the Discussion Document that the Commission should secure interconnection agreement information from potentially liable persons as a mechanism for further identifying other potentially liable persons.
40. Kordia suggested that retail service providers such as Maxnet and businesses providing international interconnection should be captured for the part of their business that operates in New Zealand.
41. Southern Cross asserted that it was not a liable person as the interconnection service provided in New Zealand is provided by its customers, not Southern Cross, and its infrastructure sits outside the PTN.
42. Some submitters suggested other providers that should be included in the list of liable persons. TelstraClear thought Sky had the requisite control over Orcon's CDN (which they considered to be a component of a PTN) and therefore should be included in the list. TelstraClear and BCL thought that Skype should be captured for its VOIP services. BCL suggested that Gisborne.net should be included as it receives RBI funding and provides telecommunications services. Vector queried why Transpower was not on the list of potentially liable persons. Chorus queried whether companies that operate virtualised networks should be caught by the definition of 'liable person'. For example, carrier cloud service providers are moving from the provisions of storage and processing in a data centre to also incorporate a virtualised network.

Attachment 2- Relevant statutory provisions

Telecommunications Act 2001

5 Interpretation

...

fixed PTN

- (a) means a PDN, or that part of a PDN, that connects an end-user's building (or, in the case of commercial buildings, the building distribution frames) to a data switch or equivalent facility; and
- (b) includes the data switch or equivalent facility and that part of the overall telecommunications link within the building that connects to the end-user's equipment

fixed PSTN—

- (a) means a PSTN, or that part of a PSTN, that connects an end-user's building to the local switches or equivalent facilities; and
- (b) includes those local switches or equivalent facilities

...

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

...

PDN or public data network means a data network used, or intended for use, in whole or in part, by the public

...

PSTN or public switched telephone network means a dial-up telephone network used, or intended for use, in whole or in part, by the public for the purposes of providing telecommunication between telephone devices

PTN or public telecommunications network—

- (a) means a network used, or intended to be used, in whole or in part, by the public for the purpose of telecommunication:
- (b) includes—
 - (i) a PSTN:
 - (ii) a PDN

...

telecommunication—

- (a) means the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound,

instruction, information, or intelligence of any nature, whether for the information of any person using the device or not; and

- (b) for the purposes of subpart 2 of Part 4, includes any conveyance that constitutes broadcasting; but
- (c) for all other purposes, does not include any conveyance that constitutes broadcasting

telecommunication link means any line, radio frequency, or other medium used for telecommunication

...

telecommunications service means any goods, services, equipment, and facilities that enable or facilitate telecommunication

telephone device means any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice frequency communication

Part 3

Telecommunications service obligations

Subpart 2—Amounts payable by liable persons to the Crown

*Annual procedure for determining amounts payable
by liable persons to the Crown*

80 Interpretation

In this subpart, unless the context otherwise requires,—

financial statements,—

- (a) except if section 79 applies, has the same meaning as in section 8 of the Financial Reporting Act 1993; and
- (b) if section 79 applies, means a consolidated statement of financial performance of the 2 or more bodies corporate required by that section to be treated as 1 person, prepared in accordance with generally accepted accounting practice, as defined in section 3 of the Financial Reporting Act 1993

minimum telecommunications revenue means \$10 million, or such other amount, as may be prescribed by regulations made under section 101(1)(a), of gross revenue (as may be determined in accordance with any specifications set by the Commission) that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to a liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount):

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

81 Subpart does not apply to certain liable persons

- (1) This subpart does not apply to a liable person in respect of a financial year (**financial year A**) if—
 - (a) the liable person was not trading in the financial year preceding financial year A; or
 - (b) the liable person's telecommunications revenue for the year preceding financial year A was less than the minimum telecommunications revenue.
- (2) For the purpose of determining whether a person is a liable person to whom this subpart applies in respect of a financial year, the Commission may, by written notice to that person, require the person to provide to the Commission, within the time specified in the notice,—
 - (a) a copy of the person's financial statements for the year preceding financial year A; and
 - (b) any further information specified by the Commission for the purpose of enabling it to verify the telecommunications revenue of that person for the year preceding financial year A; and
 - (c) a certificate that complies with subsection (3).
- (3) A certificate complies with this subsection if—
 - (a) it certifies the person's telecommunications revenue for the year preceding financial year A; and
 - (b) it is signed by 2 directors of the person with the authority of the other directors.

82 Liable persons must produce information on qualified revenue

Not later than 60 working days before the end of each financial year (**financial year A**), each liable person must provide to the Commission a copy of—

- (a) its financial statements for the financial year preceding financial year A; and
- (b) any further information specified by the Commission for the purpose of enabling it to verify the qualified revenue of that person for the financial year preceding financial year A.

83 Liable persons must produce information for purposes of liability allocation determination

- (1) Not later than 60 working days after the end of each financial year, each liable person must provide to the Commission—
 - (a) all prescribed information or, if there is no prescribed information, information specified by the Commission, for the purpose of enabling the Commission to make its determination in accordance with section 88(a); and
 - (b) a report that complies with subsection (2).
- (2) A report complies with this subsection if—
 - (a) it is prepared by a qualified auditor; and
 - (b) it includes a statement of the extent to which the information provided by the liable person under subsection (1)(a) is correct and complete.

84 Commission to prepare draft liability allocation determination

- (1) The Commission must—
- (a) prepare a draft liability allocation determination for each financial year; and
 - (b) give public notice of that draft determination; and
 - (c) include in the public notice the closing date for submissions, which must be not later than 20 working days after the date of giving public notice.
- (2) The Commission must make reasonable efforts to do the things referred to in subsection (1) not later than 80 working days after the end of the financial year.

85 Matters to be included in draft liability allocation determination

- (1) A draft liability allocation determination must include—
- (a) the amount of each liable person's qualified revenue; and
 - (b) the amount of the telecommunications development levy payable by each liable person for the financial year, calculated in accordance with the following formula:

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

where—

- a is the amount of the liable person's qualified revenue
 - b is the sum of all liable persons' qualified revenue
 - c is the telecommunications development levy specified for the relevant year in Schedule 3B; and
- (c) the methodology applied by the Commission in preparing the determination; and
- (d) the reasons for the determination.
- (2) To avoid doubt, the Commission may determine what revenue basis to use for the purposes of subsection (1)(a) (for example, a net revenue basis).

86 Conferences on draft liability allocation determination

The Commission may—

- (a) hold conferences in relation to the draft liability allocation determination; and
- (b) invite to those conferences any person who has a material interest in the determination.

87 Commission to prepare final liability allocation determination

- (1) The Commission must—
- (a) prepare a final liability allocation determination; and
 - (b) give public notice of that final determination; and
 - (c) give a copy of that final determination to all liable persons.

- (2) The Commission must make reasonable efforts to do the things referred to in subsection (1) not later than 20 working days after the closing date for submissions specified in accordance with section 84(1)(c).

88 Matters to be included in final liability allocation determination

A final liability allocation determination must include—

- (a) the amount of each liable person's qualified revenue; and
- (b) the amount of the telecommunications development levy payable by each liable person, calculated in accordance with the formula set out in section 85(1)(b); and
- (c) the methodology applied by the Commission in preparing the determination; and
- (d) the reasons for the determination.

89 Payment by liable persons to the Crown

- (1) Each liable person must pay to the Crown the amount set out in the determination in accordance with section 88(b) not later than 20 working days after the date that the determination is publicly notified.
- (2) If that amount is not paid on or before the due date,—
 - (a) it is recoverable in any court of competent jurisdiction as a debt due to the Crown; and
 - (b) the liable person must pay the Crown interest on the unpaid amount at the 90-day bank bill rate (as at 21 working days after the date on which the determination is publicly notified) plus 5% for the period from the time the amount was due until the time at which it is paid.
- (3) Subsection (2) does not authorise the imposing of interest on interest.

General matters

90 Crown use of telecommunications development levy

- (1) The amounts paid by liable persons under section 89 (collectively, the **telecommunications development levy**) 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 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.
- (2) The telecommunications development levy must not be used for a purpose under subsection (1)(d) unless the Minister has first consulted liable persons and any persons and organisations that the Minister considers appropriate having regard to the proposed use of the levy.

- (3) To avoid doubt, except as provided in section 94L, nothing in this section requires the Crown to use any amount paid by liable persons under section 89 within any particular time.

91 Commission must notify final liability allocation determination before notifying TSO cost calculation determination

- (1) The Commission may determine the priority between the preparation of a liability allocation determination and the preparation of a TSO cost calculation determination and, accordingly, may comply with sections 84 to 88 and sections 94F to 94K in the sequence, as between those 2 sets of sections, as it thinks fit.
- (2) However, the Commission must publicly notify a final liability allocation determination for each financial year in accordance with section 87(1)(b) before it publicly notifies any final TSO cost calculation determination for that financial year in accordance with section 94J(1)(b).

92 Annual telecommunications development levy may be reduced by Order in Council

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, amend Schedule 3B by reducing the annual telecommunications development levy set out in that schedule for 1 or more future years.
- (2) The Minister must not recommend the making of an order unless the Minister is satisfied that the full amount set out in Schedule 3B is not required for the purposes in section 90.

Broadcasting Act 1989

2 Interpretation

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

- (a) made on the demand of a particular person for reception only by that person; or
- (b) made solely for performance or display in a public place

...

content, in relation to transmitting on demand, means—

- (a) programmes:
- (b) visual images that consist predominantly of alphanumeric text and software intended to—
 - (i) inform, enlighten, or entertain; or
 - (ii) promote the interests of any person; or
 - (iii) promote any product or service

...

programme—

- (a) means sounds or visual images, or a combination of sounds and visual images, intended—
 - (i) to inform, enlighten, or entertain; or
 - (ii) to promote the interests of any person; or
 - (iii) to promote any product or service; but
- (b) does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text

Attachment 3 – List of Liable Persons

The Commission's view is that the following parties meet the criteria for "liable person" as defined in section 5 of the Telecommunications Act 2001. However, there may be other parties not listed who also are liable persons. In accordance with section 81 of the Act, these liable persons will only be liable for contribution to the TDL for the 2011/12 financial year if they meet the statutory definition of "liable person" and:

1. they were trading in the 2010/11 financial year, and
2. they had gross telecommunications revenue in 2010/11 greater than or equal to the minimum telecommunications revenue.

<ul style="list-style-type: none"> • Actrix Networks Ltd • Airnet NZ Ltd • Bay City Communications Ltd • CallPlus Ltd²² <ul style="list-style-type: none"> – Slingshot Ltd • Chorus New Zealand Ltd/Chorus Ltd • Compass Communications Ltd • Crown Fibre Holdings Ltd²³ <ul style="list-style-type: none"> – Whangarei Local Fibre Company Ltd – (Northpower Ltd) – Ultrafast Fibre Ltd – (Waikato Networks Ltd) • Datacom Systems Ltd • Enable Networks Ltd • FX Networks Ltd • Gisborne.net • Inspire Net Ltd • Kordia New Zealand Ltd²⁴ <ul style="list-style-type: none"> – Orcon Ltd • Maxnet Ltd 	<ul style="list-style-type: none"> • Network Tasman Ltd • Optus Networks Pty Ltd • Snap Internet Ltd • Teamtalk Ltd²⁵ <ul style="list-style-type: none"> – Araneo Ltd – Citylink Ltd • Telecom Corporation of New Zealand LTD/Telecom New Zealand Ltd • TelstraClear New Zealand Ltd • thepacific.net Ltd • Transpower New Zealand Limited • Trustpower (Kinect) Ltd • Two Degrees Mobile Ltd • Vector Communications Ltd • Verizon New Zealand Ltd • Vodafone New Zealand Ltd • Woosh Wireless Ltd • WorldxChange Communications Ltd
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

²² CallPlus Ltd wholly owns Slingshot Ltd; under s79 of the Act they are assessed as one company.

²³ Crown Fibre Holdings Ltd owns 53% of Whangarei Local Fibre Company Ltd and 80% of Ultrafast Fibre Ltd; under s79 of the Act they are assessed as one company. As both Northpower Ltd and Waikato Networks Ltd have more than 20% interests in the Whangarei Local Fibre Company Ltd and Ultrafast Fibre Ltd respectively, they are also assessed together as part of Crown Fibre Holdings Ltd block of companies in accordance with s79.

²⁴ Kordia New Zealand Ltd wholly owns Orcon Ltd; under s79 of the Act they are assessed as one company.

²⁵ Teamtalk Ltd wholly owns Citylink Ltd and 96% of Araneo Ltd; under s79 of the Act they are assessed as one company.