

12 October 2007

The Registrar
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to section 81(1) of the Electricity Industry Reform Act 1998, application is hereby made to the Commerce Commission for exemptions from the application of the Electricity Industry Reform Act 1998, as described in the application.

PERSON MAKING THE APPLICATION

1. The Applicant

- 1.1 This application is made by Lloyd Morrison (“the Applicant”). The address details for the Applicant are:

Lloyd Morrison
Infratil Limited
PO Box 320
97 The Terrace
Wellington
New Zealand

Attention: Tim Brown

Telephone: (04) 473 2399

Facsimile: (04) 473 2388

Email: Tim.Brown@[HRLMorrison.com](mailto:Tim.Brown@HRLMorrison.com)

The Applicants' Contact

- 1.2 Correspondence and enquiries should in the first instance be addressed to the Applicants' solicitors:

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Buddle Findlay
Law Offices
State Insurance Tower
BNZ Centre
1 Willis Street
PO Box 2694
DX SP20201
Wellington

Attention: Jim Stevenson/Nick Crang

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nick.crang@buddlefindlay.com

CONFIDENTIALITY

2. Requests for confidentiality

- 2.1 The Applicant does not request a confidentiality order for the fact of the application.
- 2.2 Confidentiality for specific information is requested as follows:
- 2.2.1 The Applicant seeks confidentiality for specific information in this application included in square brackets and highlighted. A copy of this application with the confidential information deleted is provided to assist the Commission.
- 2.2.2 In accordance with section 58 of the Electricity Industry Reform Act 1998 ("the EIR Act"), the Applicant requests that the Commission make a confidentiality order under section 100 of the Commerce Act 1986 in respect of this information, and that, on the expiry of any confidentiality order that the Commission makes, the information continues to be withheld under section 9 of the Official Information Act 1982.
- 2.2.3 The Applicant also requests that he be notified of any request made under the Official Information Act 1982 for the information, and be given the opportunity to be consulted as to whether the information remains commercially sensitive at the time that the request is made.
- 2.3 These requests for confidentiality are made for the following reasons:
- 2.3.1 because the information is commercially sensitive and disclosure would be likely to unreasonably prejudice the commercial position of the relevant parties; and
- 2.3.2 some of the information relates to [

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BUSINESS ACTIVITIES OF THE APPLICANT

3. Lloyd Morrison

- 3.1 The Applicant was nominated for the position of director of Auckland International Airport Limited (“AIAL”) by Infratil and the New Zealand Superannuation Fund (“NZ Super Fund”) on 10 October 2007. His nomination will be voted on at AIAL’s AGM on 20 November 2007.
- 3.2 Infratil Limited is a specialist investor in infrastructure and utility assets. The company is listed on the New Zealand Stock Exchange (NZX) and owns airports in New Zealand and Europe as well as energy and other investments in New Zealand and Australia. Infratil is the major shareholder in Wellington International Airport Limited (“WIAL”) and TrustPower Limited (“TrustPower”). Infratil and NZ Super Fund have a 6.2% shareholding in AIAL.
- 3.3 At present, the Applicant is an Infratil appointed director of WIAL, TrustPower and a number of other companies.

BUSINESS ACTIVITIES OF OTHER RELEVANT PARTIES

4. Auckland International Airport Limited (AIAL)

- 4.1 AIAL owns and operates the Auckland Airport. AIAL is a public company listed on NZX and ASX. It has a very diverse shareholding base. The two largest shareholders are the Auckland and Manukau City Councils.
- 4.2 AIAL owns an electricity distribution network at the airport. It advises that the network operates at 11,000 and 400 volts and comprises transformers, switchgear and underground cables. The network connects to Vector Limited’s citywide network at the perimeter of the airport. AIAL is a lines customer of Vector Limited.
- 4.3 AIAL distributes electricity to 366 consumers at the airport. AIAL advises that, of the 90 gigawatt-hours per annum distributed, 29 is for AIAL’s own use. AIAL levies a line charge for the provision of its line function services.
- 4.4 AIAL also advises that electricity retailers TrustPower Limited, Genesis Power Limited, Contact Energy Limited, and Mighty River Power Limited each have access to Auckland Airport’s network in accordance with Use of System Agreements in order that they may retail electricity to consumers connected to Auckland Airport’s network. [

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5. TrustPower Limited (TrustPower)

- 5.1 TrustPower operates in the electricity generation and retail sectors in New Zealand. It is currently the fourth largest electricity retailer in New Zealand. TrustPower owns 34 hydro power stations and the Tararua Wind Farm. All TrustPower's generation is based on renewable resources. TrustPower retails approximately 4,300GWh of electricity per annum to around 220,000 customers. TrustPower's primary retail bases are outside the main metropolitan areas of Auckland, Wellington and Christchurch. It retails to some AIAL tenants, as noted in paragraph 4.4 above.
- 5.2 TrustPower is listed on the NZX. There are currently three large shareholders in TrustPower. The largest shareholder is Infratil Limited, which currently owns approximately 50.5% of the shares in TrustPower.

6. Wellington International Airport Limited (WIAL)

- 6.1 WIAL owns and operates Wellington International Airport. WIAL is 66% owned by Infratil Limited, through New Zealand Airports Limited, and 34% owned by Wellington City Council.
- 6.2 WIAL's principal business is to operate Wellington International Airport. WIAL owns all the electrical wiring in the main terminal building of Wellington International Airport from the points of connection with the local distribution network operated by Vector Limited to WIAL's own electrical installations and to the premises of its tenants. It conveys electricity over these lines to its tenants and itself at a voltage of 400 V.
- 6.3 At the present time, WIAL purchases all the electricity for use in the MTB from Contact Energy Limited and both uses this electricity for itself and on-sells some of this electricity to its tenants. It pays Contact Energy for both the electricity supplied by Contact and the electricity line function services provided by Vector.
- 6.4 WIAL has recently identified that it conveyed over its electricity lines, and sold, approximately 2.7GWh per annum of electricity to its tenants in the period from 1 November 2005 to 31 October 2006. In this period, WIAL conveyed approximately 5.8GWh of electricity over its lines for its own use making a total of 8.5GWh per annum.
- 6.5 [

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INVOLVEMENTS PURSUANT TO THE EIR ACT

7. Requirements of the EIR Act

- 7.1 Section 17 of the EIR Act prohibits a person from being involved in an electricity lines business and in an electricity supply business.
- 7.2 Under the EIR Act, “involved” means that a person:
- 7.2.1 carries on that business, either alone or together with its associates and either on its own or another’s behalf; or
 - 7.2.2 exceeds the 10% threshold in section 8 in respect of that business; or
 - 7.2.3 has material influence over the business (section 7).
- 7.3 Section 11 of the EIR Act deems a manager of a person that carries on the business, as a person who has a material influence over an electricity business. “Manager” is defined in section 3 as including a director or officer of the body corporate. This means that a director of an electricity business, as a manager of a person who carries on the business, is a person with material influence over the electricity business, and is therefore involved in that business under section 7 of the EIR Act.
- 7.4 “Electricity lines business” is defined in section 4 the EIR Act as follows:
- (1) *For the purposes of this Act, electricity lines business—*
 - (a) *Means a business that conveys electricity by line in New Zealand; and*
 - (b) *Includes the ownership or operation, directly or indirectly, of lines in New Zealand or any other core assets of an electricity lines business.*
- 7.5 “Electricity supply business” is defined in section 5 of the EIR Act as follows:
- (1) *For the purposes of this Act, electricity supply business—*
 - (a) *Means a business that—*
 - (i) *Sells electricity in New Zealand:*
 - (ii) *Sells financial hedges for risks relating to the price of electricity in New Zealand:*
 - (iii) *Generates electricity in New Zealand:*
 - (iv) *Trades in rights to sell or generate electricity in New Zealand; and*

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- (b) *Includes the ownership or operation, directly or indirectly, of a generator in New Zealand or any other core generation assets; and*
- (c) *Includes the ownership or operation, directly or indirectly, of any core assets of an electricity retail business, which include—*
 - (i) *The customer data base relating to and used for the purposes of an electricity retail or electricity trading business; and*
 - (ii) *The benefit of a contract to sell electricity; and*
 - (iii) *The benefit of an undertaking from any other electricity supply business not to compete with the business.*

7.6 Sections 4(2) and 5(2) of the EIR Act set out a number of situations in which a person or business will not be classified as an electricity lines business or an electricity supply business.

8. Electricity Lines Business

Position of Auckland Airport

8.1 AIAL has advised that it distributes electricity to more than 366 consumers at Auckland Airport and levies a line charge for the provision of such line function services.

8.2 AIAL therefore operates an “*electricity lines business*” as defined in section 4 of the EIR Act as it:

8.2.1 conveys electricity by lines to its tenants as provided in section 4(1)(a) of the EIR Act; and

8.2.2 conveys more than 2.5GWh per annum, which is the threshold at which electricity supply businesses become subject to the EIR Act, as set out in section 4(2)(a) of the EIR Act.

Position of WIAL

8.3 WIAL has conveyed over its electricity lines 2.7GWh per annum of electricity over the period 1 November 2005 to 31 October 2006 to its tenants, and continues to convey at or about that amount.

8.4 WIAL therefore operates an “*electricity lines business*” as defined in section 4 of the EIR Act as it:

8.4.1 conveys electricity by lines to its tenants as provided in section 4(1)(a) of the EIR Act; and

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8.4.2 conveys more than 2.5GWh per annum, which is the threshold at which electricity supply businesses become subject to the EIR Act, as set out in section 4(2)(a) of the EIR Act.

Position of TrustPower

8.5 TrustPower does not hold any interests that could cause it to be classed as an “*electricity lines business*”.

9. Electricity Supply Business

Position of AIAL

9.1 AIAL does not hold any interests that could cause it to be classed as an “*electricity supply business*”.

Position of WIAL

9.2 WIAL operates an “*electricity supply business*” as defined under section 5 of the EIR Act. This is because:

9.2.1 it sells electricity to its tenants; and

9.2.2 sells more than 2.5GWh per annum, which is the threshold at which electricity supply businesses become subject to the EIR Act, as set out in section 5(2)(a) of the EIR Act.

9.3 The two emergency generators operated by WIAL generate less than 2.5GWh per annum. In accordance with sections 5(2)(a), 5(2)(d) and 5(2)(g) of the EIR Act, neither ownership nor operation of these generators, nor sale of the electricity generated, qualifies WIAL as an electricity supply business.

Position of TrustPower

9.4 TrustPower is an “*electricity supply business*” in terms of section 5 of the EIR Act.

10. Conclusion on EIR Act

Position of the Applicant

10.1 The Applicant is involved in two electricity supply businesses (WIAL and TrustPower) and, if appointed to the Board of AIAL, will be involved in two electricity lines businesses (AIAL and WIAL). This is because:

10.1.1 He is a director of TrustPower. This means that he is a “*manager*” in TrustPower and, in accordance with section 11(1)(a) of the EIR Act, is deemed to have material influence over the electricity supply business operated by TrustPower. This means that he is “*involved*” in that business under section 7 of the EIR Act.

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10.1.2 He is a director in WIAL, and, for the same reasons that apply in respect of his directorship of TrustPower, is deemed to be involved in the electricity supply business carried on by WIAL.

10.1.3 If appointed as a director in AIAL, he will, for the same reasons that apply in respect of his directorship for TrustPower, be deemed to be involved in the electricity lines business carried on by AIAL.

10.2 Section 17 of the EIR Act will therefore apply to the Applicant, if he is appointed to the Board of AIAL.

DETAILS OF EXEMPTIONS SOUGHT

11. Exemptions Sought

11.1 The following exemptions are sought:

11.1.1 an exemption from section 17 of the EIR Act for the Applicant in respect of AIAL and WIAL; and

11.1.2 an exemption from section 17 of the EIR Act for the Applicant in respect of AIAL and TrustPower.

11.2 The circumstances of the application, and the exemptions sought, are similar to the exemptions sought, and granted by the Commission, in relation to:

11.2.1 Various decisions in relation to directors of AIAL (Decisions No. 384, 517 and 547); and

11.2.2 Vector Limited (Decision No. 541).

GROUNDS FOR THE APPLICATION

12. The applicants' arguments for the application

12.1 In summary, the arguments in favour of the application are that taking into account the conditions proposed below, and the three primary questions the Commission considers in determining applications for exemptions under section 81, the material risk to the purposes of the EIR Act in granting the exemptions is either nil or minimal.

13. Relevant Markets

13.1 Consistent with Decision No. 348, the national electricity retail market is relevant to this application.

14. The Commission's three primary questions

14.1 The Commission has specified three primary questions that it will examine in considering applications for exemptions under section 81 of the EIR Act.

Incentives or opportunities to inhibit competition in the electricity industry

Impact of the exemption in respect of AIAL and WIAL

- 14.2 The Applicant considers that the exemption sought will have no, or a very minimal, impact on this question.
- 14.3 In particular, this is because WIAL operates an electricity supply business in respect only of the tenants at Wellington International Airport. It has no intentions or plans to expand beyond that area into the Auckland region. [

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- 14.4 Accordingly, the Applicant considers that the effects arising from any incentives or opportunities to inhibit competition over the period of this exemption are minimal.

Impact of the exemption in respect of AIAL and TrustPower

- 14.5 The Applicant considers that the exemption in respect of AIAL and TrustPower will have a minimal impact on the incentives or opportunities to inhibit competition in the electricity industry.
- 14.6 The Applicant notes that while TrustPower has a Use of System's Agreement with AIAL, TrustPower supplies electricity only to AIAL's tenants. TrustPower does not currently sell electricity to AIAL itself. Accordingly, there is no current supply relationship between the businesses of AIAL and TrustPower.
- 14.7 The Applicant also notes that, [

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- 14.8 Although TrustPower currently supplies to a number of AIAL tenants, the Applicant notes that a number of other retailers also sell electricity to AIAL's tenants. As other new retailers could also offer to sell electricity to AIAL's tenants in future, TrustPower's opportunities to act in an anti-competitive way are limited.
- 14.9 In addition, the Applicant considers that his ability to act, as a director of AIAL, in a way that could favour TrustPower or influence the way that AIAL deals with TrustPower, is very limited. This is due in particular to two reasons:
- 14.9.1 he will be only one director on the AIAL Board and Infracore has only a small shareholding in AIAL; and
- 14.9.2 as discussed below, he is unable to vote on any matter in which he was considered "interested", which would include matters relating to TrustPower.

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- 14.10 Accordingly, the extent to which there could be incentives or opportunity to inhibit competition in the electricity industry, if the exemption is granted, is limited.
- 14.11 In addition, the Applicant proposes a condition in paragraph 15.2 below aimed at ensuring that TrustPower does not become an electricity retailer to AIAL.
- 14.12 Finally, the Applicant notes that, on 13 July 2007, the Ministry of Economic Development released a draft of the Electricity Industry Reform Amendment Bill 2007, and an accompanying consultation paper. The draft Bill would change the cross-ownership prohibition under the EIR Act so that it only applies to generation or retail connected to the lines owned by a company, and would also relax the prohibition on cross-directorships. If introduced and passed, the Applicant understands that the effect of the Bill would be that the Applicant's directorships in AIAL, TrustPower and WIAL, would not be in breach of the EIR Act.
- 14.13 If passed, the Applicant's understanding is that the Bill would therefore mean that the exemptions would not be required. The Applicant acknowledges that the Bill may not be introduced, and would not pass, before the Commission reaches a decision on this application. However, the Government policy arguments provided in support of the draft Bill are relevant to the Commission's consideration of the application in respect of the exemptions.
- 14.14 As set out in a Cabinet Policy Committee paper released on 27 November 2006, the Minister of Energy and Ministry officials' reasoning for the relaxation of the prohibition on cross-directorships is to lower the costs of corporate separation and compliance. Any risk of anti-competitive behaviour in this case was seen to be mitigated by the Securities Markets Act 1988 (in the case of listed companies) and the remaining arms length rules.
- 14.15 Accordingly, the Applicant does not consider that there would be significant incentives or opportunities for either AIAL or TrustPower to inhibit competition in the electricity industry if the exemption were granted. To the extent that competition would be inhibited, this would be outweighed by the consequences for the Applicant, Infratil, the NZ Super Fund and to the parties if the exemption was not granted.

Incentives or opportunities to cross-subsidise generation activities

Impact of the exemption for AIAL and WIAL

- 14.16 The Applicant considers that the exemption it seeks will not have any impact on this question.

Impact of the exemption for AIAL and TrustPower

- 14.17 In respect of the exemption, the Applicant notes that the closest generation owned by TrustPower to Auckland Airport is in the Bay of Plenty. These generation assets are significantly geographically separated from AIAL's electricity network so that the potential for cross-subsidisation of generation activities is very limited.

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14.18 As the Commission noted in Decision No. 541 in relation to the generation assets of NGC and Vector's lines business, the potential for cross-subsidisation is of particular concern where a generator has the potential to connect generation to a local distribution network.

14.19 The Applicant also repeats the arguments made in paragraphs 14.5 to 14.14 above, in relation to the question of whether there are incentives or opportunities to inhibit competition in the electricity industry.

14.20 Accordingly, the Applicant considers that the opportunities and incentives to cross-subsidise TrustPower's generation activities from the Applicant's involvement in AIAL's electricity lines business are minimal and do not present a material risk to the purposes of the EIR Act.

A relationship not at arms' length

Impact of the exemption for AIAL and WIAL

14.21 The exemption will permit the Applicant to continue as a director of WIAL and, if voted in, become a director of AIAL. The Applicant considers that the effect of these involvements over the period of the exemption is minimal or non-existent, for the reasons given above.

Impact of the exemption for AIAL and TrustPower

14.22 The Applicant notes that the Commission observed in Decision No. 541 that in most circumstances where an exemption was required from the ownership separation provisions of the EIR Act, a relationship will be created that will ultimately not be at arms length. In each case, the Commission assesses the practical effect of the non-arms length relationship in order to decide whether that relationship is likely to lead to a result that would be contrary to the purposes of the EIR Act.

14.23 In respect of the exemption, the Applicant notes that the relevant electricity lines business and the relevant electricity supply business will be operated in separate companies. Although this is not "arms length" as defined in the EIR Act (particularly because the Applicant will, if voted in as a director of AIAL, be a director of both companies), taking into account the points made above in relation to the first two questions, there is little practical effect in terms of the conduct which the EIR Act was designed to prevent.

14.24 Further, the Applicant's presence as a director of both AIAL and TrustPower confers little, if any, ability to create a relationship between the two companies that is not at arms' length.

14.25 In addition to the arguments above, this is because both AIAL and TrustPower have provisions in their constitutions or are bound by rules by virtue of the NZX Listing Rules that prevent interested directors from voting on a matter related to an interested transaction except in limited circumstances. In relation to the Applicant, these provisions would apply to a transaction involving both AIAL and TrustPower.

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14.26 Clause 32.2 of AIAL's constitution deals with the personal involvement of directors in transactions with the company. Clause 32.2 is expressly subject to the NZX Incorporation Rules (the NZX Listing Rules as set out in Appendix 6 of the Rules). Clause 2.2 of the AIAL Constitution also incorporates the NZX Incorporation Rules into AIAL's constitution.

14.27 Most relevantly, Rule 3.4.3 of the NZX Listing Rules states:

“Interested directors: Subject to Rule 3.4.4, a director shall not vote on a board resolution in respect of any matter in which that director is interested, nor shall the director be counted in the quorum for the purposes of consideration of that matter. For this purpose, the term “Interested” bears the meaning assigned to that term in section 139 of the Companies Act 1993, on the basis that if an issuer is not a company registered under that Act, reference to the “company” in that section shall be read as a reference to the issuer.”

14.28 Clauses 12.15.3 and 12.15.4 of TrustPower's constitution state:

12.15.3 **No voting by interested Director** – A Director shall not vote in respect of any matter in which that Director is interested, nor shall the Director be counted in the quorum in any meeting to consider the matter, except that a Director may vote in respect of, and be counted in the quorum for the purposes of, a matter in which he or she is interested if that matter is one in respect of which, pursuant to an express provision of the Act, Directors are required to sign a certificate or one which relates to the grant of an indemnity pursuant to section 162 of the [Companies] Act.

12.15.4 **Exceptions** – Nothing in Clause 12.15.2 applies in relation to the matters referred to in section 143.

14.29 The Applicant also notes that clause 2.1(c) of TrustPower's constitution and clause 2.7 of AIAL's constitution provide that if there is any inconsistency between the NZX Listing Rules and a provision of the constitution, the Listing Rules will prevail. TrustPower is therefore effectively unable to remove the interested director provisions from their constitutions. In AIAL's case, it is effectively unable to make provision in its constitution for anything inconsistent with rule 3.4.3 of the Listing Rules.

14.30 In Decision No. 547, the Commission accepted that similar provisions in the NZX Listing Rules prevented Mr Boyd from voting on matters in relation to which he had declared a conflict of interest, but considered there could be the opportunity for competition to be inhibited by means of the formal voting process. Nevertheless, the Commission seems to accept that these kind of voting restrictions are relevant.

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15. Proposed conditions

- 15.1 The Applicant proposes that the exemption sought in paragraph 11.1.1 above be subject to the condition that the exemption continue for so long as WIAL continues to have an electricity supply business.
- 15.2 The Applicant proposes that the exemption sought in paragraph 11.1.2 above be subject to the condition that he will procure, to the fullest extent possible, that AIAL not enter into an arrangement with TrustPower permitting TrustPower to sell electricity to AIAL itself.

CONCLUSION

16. Fees

- 16.1 We **enclose** a cheque for \$11,250.00 for the prescribed adjudication fee. Please advise us of the actual cost of processing the application and the amount of any possible refund as soon as practicable.

17. Declaration

- 17.1 A declaration in the prescribed form by Lloyd Morrison, as applicant, is **attached** to this application.

18. Further Information

- 18.1 We would be pleased to discuss any issue in this application on which the Commission might require further clarification. As noted above, any such queries should in the first instance be directed to the applicant's solicitors.

DECLARATION

This application is made by Lloyd Morrison. Lloyd Morrison confirms that:

- all information requested by the Commerce Commission has been supplied;
- all information known to the applicant which is relevant to the consideration and determination of this application has been supplied to the Commerce Commission; and
- all information supplied by the applicant to the Commerce Commission is correct as at the date of this application.

Lloyd Morrison undertakes to advise the Commission immediately of any material change in the circumstances relating to this application.

DATED this 12th day of October 2007

Signed by: Lloyd Morrison
