

PUBLIC VERSION

4 September 2008 (revised version as at 20 February 2009)

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 revised application form is submitted by H.R.L. Morrison & Co Group Limited ("the Applicant"), at the Commerce Commission's ("the Commission") request, to take into account the passage of the Electricity Industry Reform Amendment Act 2008, which came into effect on 14 October 2008. The Commerce Commission has confirmed in email correspondence of 19 December 2008 with Buddle Findlay, that the application incorporating this revision will remain registered as on 4 September 2008.

1.2 The address details for the Applicant are:

H.R.L. Morrison & Co Group Limited
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Wellington
New Zealand

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The Applicant's Contact

1.3 Correspondence and enquiries should in the first instance be addressed to the Applicant's solicitors:

Buddle Findlay
Law Offices
State Insurance Tower
BNZ Centre

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PO Box 2694
DX SP20201
Wellington

Attention: Nick Crang/Jim Stevenson

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CONFIDENTIALITY

2. Requests for confidentiality

- 2.1 The Applicant does not request a confidentiality order for the fact of the amended application form.
- 2.2 Confidentiality for specific information is requested as follows:
- 2.2.1 The Applicant seeks confidentiality for the specific information in this application that is enclosed 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.
- 2.2.3 Furthermore, the Applicant requests 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. The Applicant also requests that it 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 because the information is commercially sensitive and disclosure would be likely to unreasonably prejudice the commercial position of the parties the information relates to.

BUSINESS ACTIVITIES OF THE APPLICANT

3. H.R.L. Morrison & Co Group Limited

- 3.1 The Applicant is, itself and through wholly owned subsidiaries, a specialist investment bank, asset manager, fund manager and energy adviser and consultant.
- 3.2 One of the Applicant's subsidiaries is Morrison & Co Funds Management Limited ("MCFM"). MCFM is a manager (on a non-exclusive basis) for the Guardians of New Zealand Superannuation Fund ("NZ Super Fund") investments in infrastructure assets.
- 3.3 The NZ Super Fund is a statutory body established by the New Zealand Superannuation Act 2001 ("the Act") to manage and administer savings and investments on behalf of New Zealanders. The Act requires the NZ Super Fund to invest on a prudent, commercial basis and, in doing so, must manage and administer its assets in a manner consistent with (among others):
- 3.3.1 Best-practice portfolio management; and
 - 3.3.2 Maximising return without undue risk.
- 3.4 This arrangement is set out in a management agreement between NZ Super Fund and MCFM ("the NZSF Management Agreement"). The NZSF Management Agreement provides that MCFM has all the powers and discretions in managing and investing NZ Super Fund's infrastructure portfolio that a natural person would have. MCFM is required to invest in accordance with the principles noted in paragraph []. MCFM does not exercise voting rights in AIAL shares on behalf of NZ Super Fund. []
- 3.5 The NZ Super Fund had total funds in excess of \$14.7 billion as at 31 May 2008. The initial amount MCFM has been appointed to invest under the NZSF Management Agreement is \$[]. MCFM has made investments on NZ Super Fund's behalf in a number of companies. Of relevance to this application is that as at 4 September 2008 MCFM purchased and managed for NZ Super Fund 6.936% of the shares in AIAL. MCFM manages these shares on NZ Super Fund's behalf.
- 3.6 Morrison & Co Infrastructure Management Limited ("MCIM") is also a wholly-owned subsidiary of the Applicant. MCIM is the manager (on an exclusive basis) of Infratil Limited ("Infratil").
- 3.7 Infratil is a specialist investor in infrastructure and utility assets. The company is listed on the New Zealand 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 TrustPower Limited ("TrustPower"). Infratil also had at 4 September 2008 47,421,336 shares, amounting to a 3.88% shareholding, in AIAL.

- 3.8 MCIM has a management agreement with Infratil (“the Infratil Management Agreement”) under which it is appointed as the sole and exclusive manager of Infratil unless otherwise agreed. MCIM’s powers under the Infratil Management Agreement include the power to purchase, subscribe for, or otherwise acquire securities on behalf of or in the name of Infratil, and the power and authority to exercise on behalf of Infratil any right or power that Infratil has in the securities. This includes the power to vote at meetings.
- 3.9 Infratil and MCIM agreed by letter on 22 August 2008 that the Infratil Management Agreement does not apply to shares or other control rights in AIAL held or acquired by Infratil from time to time. This ensured the Applicant, from the date of the letter, was not in breach of the EIR Act by reason of holding (through its wholly-owned subsidiaries) more than 10% of the control rights in both TrustPower and AIAL (refer to paragraph 6.6).
- 3.10 If the exemption sought in this application is granted, Infratil may consider, at some future date, whether to have its shares in AIAL again managed by MCIM under the Infratil Management Agreement.

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 Australian Stock Exchange (“ASX”). Apart from the NZ Super Fund, other large shareholders include the Auckland City Council (12.75%¹) and the Manukau City Council (9.55%).
- 4.2 AIAL has 6 directors. One director, Lloyd Morrison is a related party to the Applicant. As far as the Applicant is aware, all other directors are entirely independent of the Applicant, MCFM, MCIM, Infratil, TrustPower or any other party relevant to this application. AIAL’s chairman is Tony Frankham and he is an “independent director” in terms of the NZX Listing Rules.
- 4.3 AIAL has its own senior management group headed by recently appointed chief executive, Simon Moutter. As far as the Applicant is aware, all of AIAL’s senior management group are entirely independent of the Applicant, MCFM, MCIM, Infratil, TrustPower or any other party relevant to this application.
- 4.4 AIAL owns an electricity distribution network at the airport. The network operates at 11,000 and 400 volts and comprises transformers, switchgear and underground cables². The network connects to Vector Limited’s citywide network at the perimeter of the airport. AIAL is a lines customer of Vector Limited.

¹ AIAL Annual Report, 2007

² Commerce Commission Decision No. 629

- 4.5 AIAL distributes electricity to approximately 366 consumers at the Auckland Airport. Of the approximately 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.
- 4.6 Electricity retailers TrustPower, Genesis Power Limited, Contact Energy Limited and Mighty River Power Limited each have access to AIAL's network in accordance with Use of System Agreements in order that they may retail electricity to consumers connected to Auckland Airport's network. AIAL is not itself a supplier of electricity either on its own lines network or any other. []

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 4.6 above.
- 5.2 TrustPower is listed on the NZX. There are currently two large shareholders in TrustPower. The largest shareholder is Infratil, which currently owns approximately 50.5% of the shares in TrustPower. The second largest shareholder is the Tauranga Energy Consumer Trust, whose beneficiaries are electricity consumers with a TrustPower account situated in Tauranga and the Western Bay of Plenty.

INVOLVEMENTS PURSUANT TO THE EIR ACT

6. Requirements of the EIR Act

- 6.1 Section 17 of the EIR Act makes it a contravention of Part 2 of the Act for a person to breach the connected generation cap or connected customers selling cap.
- 6.2 The connected generation cap is not relevant to this application. The connected customers selling cap is set out in section 17C of the EIR Act. This section provides that the cap is breached if a person is involved in selling more electricity to connected customers within a local network area than the person's qualifying generation within that local network area. The person's qualifying generation is the sum of the total annual nominal MWh capacity of the generation listed in section 17C(2) of the EIR Act.
- 6.3 The term "sell" is defined in section 3 of the EIR Act to mean "any arrangement under which any electricity is brought and sold, except financial hedge contracts".
- 6.4 The term "connected customer" is defined in section 3 of the EIR Act to mean a consumer to whom a person sells electricity, if:
- 6.4.1 the electricity is conveyed to that customer on a line in which the person is involved; and

- 6.4.2 the consumer and the line are within the same network area.
- 6.5 Under the EIR Act, as relevant to this application, “*involved*” means that a person:
- 6.5.1 is involved in a line if the person conveys electricity by the line, or owns or operates, directly or indirectly a line or any other assets used in connection with the line, either alone or together with associates and either on its own or another’s behalf;
- 6.5.2 is involved in selling electricity, if the person sells electricity to a customer either on its own or another’s behalf;
- 6.5.3 is involved in either of the things referred to in the above subparagraphs, if the person:
- 6.5.3.1 carries on that business, either alone or together with its associates and either on its own or another’s behalf; or
- 6.5.3.2 exceeds the 10% threshold in section 8 in respect of that business; or
- 6.5.3.3 has material influence over the business (section 7).
- 6.6 The 10% threshold in section 8 of the EIR Act is defined to include holding more than 10% of the control rights in a business or holding more than 10% of the equity return rights in the business.
- 6.7 A control right is defined in section 9 of the EIR Act to mean a voting right attaching to a voting security. Under section 9(2) a person has a control right if the person would have a relevant interest, under sections 5 to 5B of the Securities Markets Act 1988, in the voting securities that confer that right.
- 6.8 An equity return right is defined in section 10 of the EIR Act to mean a right or entitlement or expectation to receive equity returns, directly or indirectly, of a business.

7. Applicants involvements and possible involvements under the EIR Act

- 7.1 The Commission’s application form asks for information on whether the Applicant is an electricity lines business or electricity lines supply business, or both. These terms are not now used in the EIR Act, as amended by the Electricity Industry Reform Amendment Act 2008. Instead, the issue is whether a person breaches the connected generation cap or the connected customers selling cap.
- 7.2 In respect of the connected customers selling cap, TrustPower sells electricity as defined under section 3 of the EIR Act. The Applicant holds a relevant interest in 50.5% of the shares in TrustPower by reason of it owning and controlling MCIM, which is the manager of the shares held by Infratil in TrustPower. In accordance with section 9 of the EIR Act this means that it exceeds the 10% threshold in

section 8 of that Act in respect of TrustPower, and is therefore “*involved*” in the sale of electricity by TrustPower under section 7 of the EIR Act.

- 7.3 This involvement is not disregarded under section 19(1)(ge) of the EIR Act because Trustpower, the business that the Applicant is involved in, sells more than 5GWh per annum of electricity to connected customers within the AIAL electricity network.
- 7.4 As noted above, AIAL owns and operates the lines and other assets comprising the electricity network at Auckland International Airport. As at 4 September 2008, the Applicant had a relevant interest in only 6.936% of the shares in AIAL by reason of it owning and controlling MCFM, which is the manager of the shares held by the NZ Super Fund in AIAL. This was not sufficient to give it an involvement in the lines owned and operated by AIAL for the purposes of the definition of “*connected customers*” in section 3 of the EIR Act because that relevant interest is less than 10%. []
- 7.5 Further, as indicated above, Infratil may wish at a future date for the Infratil Management Agreement to apply to shares or other control rights in AIAL. If so, this might result in the Applicant having a relevant interest in more than 10% shares in AIAL under section 26 of the Securities Markets Act 1988.
- 7.6 In accordance with sections 9 and 10 of the EIR Act, that might mean that the Applicant would exceed the 10% threshold in section 8 of that Act in respect of AIAL, and would therefore be “*involved*” in the lines owned and operated by AIAL for the purposes of the definition of “*connected customers*” in section 3 of the EIR Act.
- 7.7 This involvement would not be disregarded under section 19(1A)(c) of the EIR Act because AIAL conveys more than the 5GWh per annum threshold at which no account is taken of a persons involvement in a line.
- 7.8 The Applicant does not, and is most unlikely to, have any connected generation within AIAL’s local area network that it could offset against the sales of electricity on the AIAL network by Trustpower.
- 7.9 Accordingly, it is possible that the Applicant will, at some time, breach the connected customers selling cap. At that point, section 17(2)(b) of the EIR Act would apply to the Applicant, in respect of its cross-involvement in AIAL’s lines and TrustPower’s selling of electricity.
- 7.10 As noted above, the connected generation cap is not relevant to this application. This is because the Applicant is not involved in any generation connected to AIAL’s network.

DETAILS OF EXEMPTION SOUGHT

8. Exemption Sought

- 8.1 We seek an exemption from section 17 of the EIR Act for the Applicant to permit possible involvement between the sale of electricity by TrustPower on AIAL's network and AIAL's lines.
- 8.2 The above exemption is sought to enable Infratil and MCIM, if they wished at a later date, to agree to the Infratil Management Agreement again applying to Infratil's shares or other control rights in AIAL, without the Applicant thereby being in breach of the EIR Act. This would enable MCIM to manage the shares held by Infratil in AIAL and any additional shares acquired by Infratil in AIAL. []
- 8.3 The above exemption is sought subject to the condition that the Applicant does not hold [].
- 8.4 The following decisions of the Commission under the EIR Act may be relevant to this application:
- 8.4.1 the decision in relation to Lloyd Morrison's directorship of AIAL and TrustPower (Decisions Nos. 629);
 - 8.4.2 various decisions in relation to directors of AIAL (Decisions No. 384, 517 and 547); and
 - 8.4.3 the decisions in relation to Vector Limited (Decision No. 541), Infrastructure and Utilities NZ Limited (Decision No. 360), and Alliant International New Zealand Limited and Utilities Investments Limited (Decision No. 361).

GROUNDS FOR THE APPLICATION

9. The Applicant's arguments for the application

- 9.1 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.

10. Relevant Markets

- 10.1 Consistent with Decision No. 629, the relevant markets for this application are the relevant electricity retailing markets and the electricity distribution market that corresponds with AIAL's electricity distribution network.

11. The Commission's three primary questions

- 11.1 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

11.2 The Applicant considers that the exemption would have a minimal impact on the incentives or opportunities to inhibit competition in the electricity industry, and specifically in respect of the retail electricity market comprising the consumers connected to AIAL's distribution network. There are a number of reasons for this:

- (A) the shareholdings in AIAL that the Applicant would be permitted to have control rights in would not give the Applicant the ability to influence electricity supply decisions in relation to AIAL's distribution network through share voting. In summary, the reasons for this are that:
- the Applicant would not have sufficient control rights to control shareholder meetings;
 - decisions relating to AIAL's electricity supply are made by executives of AIAL, perhaps in some circumstances approved by AIAL's directors. They have never been, and would never be, made by the shareholders of AIAL;
 - in any event, MCFM does not exercise voting rights in AIAL shares on behalf of NZ Super Fund. []; and
 - for practical purposes, the Applicant would therefore only ever have voting control of up to 10% of AIAL's shares, being shares that are or may be acquired by Infratil.
- (B) the Applicant's ability to influence matters relating to the supply of electricity over AIAL's network through means other than share voting is also limited; and
- (C) the Management Agreements in place prevent MCIM and MCFM respectively, and therefore the Applicant, from using management control over either Infratil's shares in AIAL (if these shares were subject to the Infratil Management Agreement) or NZ Super Fund's shares in AIAL (voting of which is subject to tight constraints) for the benefit of TrustPower.

These are discussed further below.

A NO ABILITY TO AFFECT ELECTRICITY SUPPLY DECISIONS THROUGH SHARE VOTING

11.3 The proposed exemption would permit the Applicant to have only less than [] of the control rights in AIAL for the purposes of the EIR Act. Control of a combined shareholding for Infratil and NZ Super of [] or less would be inadequate to give the Applicant control or influence over AIAL sufficient to influence electricity supply decisions in relation to AIAL's distribution network. In particular, it would not give the Applicant the ability to control or determine the voting in shareholder meetings. In this regard, there are a number of other large shareholders in AIAL including

Auckland City Council and Manukau City Council, who regularly vote at meetings, meaning that even a shareholding of [] would not give the Applicant control or influence.

- 11.4 Further, decisions on electricity supply would not, in any event, be made by shareholders but by management. This has been the practice at AIAL and accords with normal management principles. At the most, such decisions might be referred or advised to the Board. In the circumstances of AIAL a shareholding of up to [] would not be sufficient to gain control of the board of directors with an agenda to force management to make a specific decision on electricity supply.
- 11.5 Furthermore, as noted above, MCFM does not exercise voting rights in the shares in AIAL it manages for NZ Super. NZ Super exercises its voting rights through its custodian, although it receives advice from MCIM. For example, NZ Super decided on how to vote its shares in relation to the bid by the Canadian Pension Plan for shares in AIAL. Accordingly, MCFM would never be in the position of voting NZ Super's shares in AIAL in such a way as to promote or force an outcome that might contravene the purpose of the EIR Act.
- 11.6 In addition, Infratil cannot hold control rights in AIAL in excess of 10% without a further exemption under the EIR Act (which is not being made at this time). This is because of its cross ownership with TrustPower. It follows that MCIM (because Infratil is its only client) is practically restricted to the same limit, even under the conditions proposed in paragraph 12.1. For practical purposes, therefore, the Applicant will only ever have voting control of a maximum of 10% of AIAL's shares. This is within the 10% control threshold in section 8 of the EIR Act.
- 11.7 In considering these issues, the reason for the threshold in section 8 of the EIR Act being set at 10% is important. In submissions to the Select Committee that considered the Bill that became the EIR Act, a number of submitters submitted that the 10% would be too low. The Select Committee responded in its report on the Bill that in a widely owned company, a very low shareholding can give effective control. The Applicant submits, in the case of AIAL particularly given the shareholdings of Manukau City Council and Auckland City Council, that a shareholding up to the [] limit proposed in the conditions suggested at paragraph 12.1 would not have this effect. Accordingly, granting the exemption would not be contrary to the purposes of section 8 of the EIR Act.
- 11.8 In Decision No. 361 (Alliant NZ and Utility Investments) and Decision No. 541 (Vector), the Commission considered situations in which the 10% threshold in section 8 in respect of an electricity lines and an electricity supply business had been exceeded and the parties were in breach of section 17. In Decision No. 361 Alliant NZ and Utility Investments wished to on-sell their entire investment holdings in Powerco (an electricity lines business) and Central Power (an electricity lines business) and retain shares in TrustPower (an electricity supply business). Alliant NZ and Utility Investments had, as associates, 16.5% of the control and equity return rights in Powerco. Alliant NZ and Utility Investments had respective direct

individual shareholdings in TrustPower of 2.07% and 9.53%, with Utility Investments having a further indirect shareholding of 2.6% in TrustPower as a result of its shareholding in Infratil. The investment agreement which existed between Infratil, Alliant NZ and Utility Investments resulted in Alliant NZ and Utility Investments having more than 10% of the control rights in TrustPower.

- 11.9 In Decision No. 541 Vector (an electricity lines business) sought an exemption in relation to its proposed acquisition of up to 100% of shares in NGC Holdings Limited (an electricity supply business). NGC also held a 25.1% shareholding in Wanganui Gas Limited, an electricity retailer.
- 11.10 In those Decisions, the Commission noted the following factors in favour of granting the application:
- 11.10.1 the cross-involvements were in the form of minority shareholdings rather than of a wholly-owned electricity lines and supply businesses;
 - 11.10.2 the presence of other shareholders who may have non-commercial imperatives; and
 - 11.10.3 undertakings by the parties not to interfere in the operation and management of other parties.
- 11.11 In both decisions, the exemptions sought by the applicants were granted.
- 11.12 The Applicant submits that the first two factors listed in paragraph 11.10 are relevant to the current application. In respect of the factor in 11.10.1, under the exemptions sought it would be able to have only a maximum of less than [] of the control rights in AIAL. In respect of the factor in paragraph 11.10.2, the two other largest shareholdings in AIAL are both held by local authorities and the second largest shareholder in TrustPower is the Tauranga Energy Consumer Trust, whose beneficiaries are electricity consumers (see paragraph 5.2).
- 11.13 The Applicant further notes that a 20% threshold applies under the Takeovers Code. The Takeovers Code was arrived at following extensive work and consultation undertaken by the Takeovers Panel Advisory Committee and then the Takeovers Panel. The Report of the Takeovers Panel on the Takeovers Code (June 1995), when it recommended the draft Code to the Government, noted that the percentage restrictions on takeovers were "fundamental" in that they force changes to be effected through the compliance options in the Code. The Panel also recorded its view that the 20% trigger reflected the specific objective of ensuring that all shareholders can participate in a transfer of control. Accordingly, the Panel said that "the trigger percentage must be set at a shareholding level clearly **below** (our emphasis) that level which normally suffices to pass control. For this reason, the Panel established the threshold at 20%" (page 7). Other takeover regimes have a compulsory bid structure where a bidder who achieves a specified shareholding is deemed to have achieved control and must make a takeover offer. This is the United Kingdom approach and the control threshold is 30%. Any such

percentage is inevitably an approximation because of the circumstances of individual companies.

11.14 The fact that a 20% threshold applies under the Takeovers Code, while not determinative under the EIR Act, should be taken as a strong indication that [] would not formally provide any degree of control or influence. Further, as far as the Applicant is aware, there is no international precedent or academic literature suggesting that control passes at anything up to the limit proposed in paragraph 12.1.1.

B. NO OR VERY LIMITED ABILITY TO INFLUENCE MATTERS RELATING TO THE SUPPLY OF ELECTRICITY THROUGH OTHER MEANS

11.15 The Applicant's ability to influence matters relating to the supply of electricity over AIAL's network through means other than the voting of shares is, at best, very limited.

11.16 The Applicant notes that in previous decisions involving the appointment of directors to AIAL's Board who were also involved in electricity supply businesses, the Commission considered that opportunities for competition could be inhibited by means other than through formal voting processes. In Decision Nos. 384, 517 and 547 the Commission decided to prohibit the relevant electricity supply business from supplying electricity to customers connected to AIAL's network.

11.17 However, in Decision No. 629, the Commission decided to grant an exemption to Lloyd Morrison without such a condition because there already existed a relationship between TrustPower and AIAL that was formed prior to Lloyd Morrison's cross-involvement. The Commission decided that repeating a condition such as the condition that applied in Decision Nos 384, 517 and 547 in that case would have the considerable effect of limiting retail competition on AIAL's network.

11.18 In the present case, the Applicant submits that the informal opportunities for it as the manager of shareholdings of other parties to influence electricity supply over AIAL's network are even more limited than in Decision No. 629. It nevertheless proposes in paragraph 12.1.2 that the exemptions be granted subject to a condition prohibiting the Applicant's involvement (or perceived involvement) in matters that relate to or could affect or favour the supply of electricity by TrustPower (or disadvantage any other electricity supply business other than TrustPower) on AIAL's electricity distribution network or the provision of electricity lines services by AIAL to TrustPower.

11.19 The Applicant also notes that in Decision No. 517 (Dr Keith Turner), the Commission considered that there existed the possibility that AIAL's electricity business could subsidise Meridian's generation activities via a use of system agreement negotiated between Meridian and AIAL which did not provide a commercial return to AIAL. The Commission held that the negotiation of such an agreement could be influenced by the presence of Dr Turner as a person having material influence in the two companies.

11.20 It is very difficult to see how the Applicant could influence the negotiation of a use of system agreement in the same way that the Commission thought might arise in Dr Turner's case. It is several steps removed from this kind of operational decision. In any case, a use of system agreement already exists between TrustPower and AIAL, on the standard terms use by AIAL. In all cases where TrustPower supplies electricity to consumers on AIAL's network, TrustPower passes on line charges from AIAL at cost, as it is bound to do under the supply agreements with those consumers. The condition proposed below would prevent the Applicant from seeking to influence, even if this were possible, the terms of this agreement, any future agreement or their application by WIAL.

11.21 The Applicant also notes that, []

C. THE OBLIGATIONS UNDER THE MANAGEMENT AGREEMENTS

11.22 Third, the Applicant's wholly-owned subsidiaries are required by the Infratil Management Agreement and the NZ Super Fund Management Agreement to manage the investments of Infratil and the NZ Super Fund, respectively, for the benefit of those entities respectively. [] The Applicant submits that it would be contrary to the above obligations for it to act in a way that used its management control over its wholly-owned subsidiaries to require them to use their management control over either party's shares in AIAL for the benefit of TrustPower.

11.23 Accordingly, the extent to which there could be incentives or opportunity to inhibit competition in the electricity industry, if the exemption is granted, is nil or minimal.

A relationship not at arms' length

11.24 The Applicant considers, if the exemptions were to be granted, that the Commission would not thereby be permitting a relationship between AIAL and TrustPower that is not at arms length. In this regard, these businesses are separate companies. Further, the way in which the Applicant's interest in both companies is managed would comply with the arms length rules in Schedule 1 of the EIR Act, if they did apply, as detailed in paragraphs 11.1 to 11.23 above.

11.25 However, if a relationship not at arms length is created, the Applicant considers that there would be little practical effect in terms of the conduct which the EIR Act was designed to prevent.

12. Proposed conditions

12.1 The Applicant proposes that the exemption sought in paragraph 8.1 above be subject to the conditions that:

- 12.1.1 The Applicant does not hold a relevant interest (as defined in section 9(2) of the EIR Act), in [] of the control rights (as defined in section 9 of the EIR Act) or [] of the equity return rights (as defined in section 10 of the EIR Act) in AIAL; and
- 12.1.2 Neither the Applicant nor any of its subsidiaries may participate in any decision making by TrustPower Limited and/or AIAL regarding matters that relate to or could affect or favour the supply of electricity by TrustPower (or disadvantage any other electricity retailer other than TrustPower) on AIAL's electricity distribution network or the provision of electricity lines services by AIAL to TrustPower, including:
- 12.1.2.1 the selection of, and any negotiation with, any electricity retailer for the supply, or intended supply, of electricity to AIAL;
- 12.1.2.2 the supply, or intended supply, of electricity by TrustPower to any new, or existing, consumers on AIAL's electricity distribution network; and
- 12.1.2.3 shall not disclose the outcomes of any discussion or decision making by AIAL to TrustPower on those matters.

CONCLUSION

13. Declaration

- 13.1 A declaration in the prescribed form by H.R.L. Morrison & Co Group Limited, as Applicant, is **attached** to this application.

14. Further Information

- 14.1 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 H.R.L. Morrison & Co Group Limited. H.R.L. Morrison & Co Group Limited 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.

H.R.L. Morrison & Co Group Limited undertakes to advise the Commission immediately of any material change in the circumstances relating to this application.

DATED this day of 2009

Signed by: H.R.L. Morrison & Co Group Limited

Name:

Position:

APPENDIX 1

**ANNUAL AMOUNTS OF ELECTRICITY SOLD TO AIAL CUSTOMERS BY TRUSTPOWER
AS AT 4 SEPTEMBER 2008**

Period 2007/2008	AIAL Load (kWhrs)	Estimated NZ Load (KWhrs)	% of National Load on AIAL Network
[]	[]	[]	[]
[]	[]	[]	[]
[]	[]	[]	[]
[]	[]	[]	[]
[]	[]	[]	[]
[]	[]	[]	[]
[]	[]	[]	[]
Total:	[]		