

DAVID HENDERSON AND RELATED COMPANIES

**APPLICATION FOR EXEMPTION UNDER
SECTION 81 OF THE ELECTRICITY INDUSTRY
REFORM ACT 1998**

RUSSELL McVEAGH

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Date of Application

1. 23 June 2004.

Applicant

2. The applicant is David Henderson and the other entities specified in this application and referred to in Appendix 1 to this application (collectively referred to as "**Henderson**").

Introduction

3. Through various companies Henderson has an interest in the following properties in Auckland:
 - (a) Princes Wharf;
 - (b) 490 Queen Street;
 - (c) Cnr Albert & Swanson Street;
 - (d) 6 Lorne Street; and
 - (e) Victoria Park Market.

(collectively referred to as "**Properties**"). Henderson also owns the electricity infrastructure at the property known as No 1. Hobson Street ("**Hobson Street**").

4. The Properties are leased to third parties, and Henderson entities supply, or propose to supply in future, electricity to these tenants. The Properties comprise principally residential apartments with some commercial units. In addition at Hobson Street, the apartment building is unit titled and Henderson entities supply electricity to the apartment owners/occupiers.

Application

5. Pursuant to section 81 of the Electricity Industry Reform Act 1998 ("**EIR Act**"), application is hereby made to the Commerce Commission for an exemption from the application of the EIR Act, in particular the ownership separation provisions of the EIR Act, as described in this application.
6. This application explains the relationship of the EIR Act to Henderson's business and specifies the conditions on which Henderson will conduct its business if the exemption is granted.

Nature of Henderson's Business

7. Henderson together with other entities also owned by David Henderson are property developers and investors in New Zealand and in Australia. Henderson undertakes substantial apartment developments as well as commercial developments.

Electricity supply

8. The electricity supplied to tenants of the Properties at Princes Wharf, No 1 Hobson Street and 490 Queen Street together exceeds 2.5 GWh per annum. Henderson also proposes to commence supplying electricity to the Properties at Cnr Albert and Swanson Streets and 6 Lorne Street. The same supply company (Electricity Direct Limited ("**Electricity Direct**")) will provide that supply.

Embedded Electrical Wiring Systems

9. Electricity supplied to the Properties is conveyed by means of the existing embedded electrical wiring systems within the Properties.

Common Services

10. Henderson purchases electricity to run services in the common areas of the Properties such as lighting and central air conditioning systems. The cost of this electricity, along with general running expenditure (such as cleaning common areas), is recovered from the tenants as part of the operating expenditure charge.

Lease Clauses and Arrangements Relating to Electricity Supply

11. The leases in respect of certain of the Properties contain clauses that relate to the supply of electricity (and, in some cases, other utilities). The different types of lease clauses relating to electricity are set out in the Schedules of Lease Clauses forming Appendix 2.
12. Some clauses require the tenant to take supply from the landlord and the landlord has the option of choosing whether or not it will supply the tenant with electricity.
13. Henderson's policy with tenants is to continue to act fairly and reasonably and provide the best service possible. Henderson believes it is offering the best service it can to tenants by negotiating with electricity retailers for lower electricity prices, and then passing on these savings to its tenants.

14. Although no electricity is currently supplied to the Cnr Albert & Swanson Street and 6 Lorne Street, It is intended that all of the Properties will be supplied with electricity by Electricity Direct.

Application of the EIR Act

Electricity Lines Businesses

15. Section 4 provides that:
- (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.
 - (2) None of the following activities brings a person within subsection (1):
 - (a) conveying, together with its associates (if any), less than 2.5 GWh per annum; ...
16. The following entity is an electricity lines business under section 4 of the EIR Act:
- (a) P.W. Services Limited because it:
 - (i) owns, directly, lines that convey electricity in New Zealand, being the embedded electrical wiring systems at the Properties (section 4(1)(a) and(b)); and
 - (ii) is not exempt from the meaning of "electricity lines business" through section 4(2).
17. Section 7 provides that:
- (1) For the purposes of this Act, a person is involved in an electricity business if the person:
 - (a) carries on that business, either alone or together with its associates and either on its own or another's behalf; or
 - (b) exceeds the 10% threshold in section 8 in respect of that business; or

(c) has material influence over the business;

and "involvement" has a corresponding meaning.

18. The electricity lines business identified in paragraph 16 above is involved for the purposes of section 7 of the EIR Act because it:

- (a) carries on its electricity lines business, either alone or together with its associates and either on its own or another's behalf (section 7(1)(a));
- (b) exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in the electricity lines business;
- (c) has material influence over the electricity lines business.

19. The following entities are also involved in the above electricity lines businesses:

- (a) Princes Wharf Management Limited because as the 100% shareholder in P.W. Services Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, has a material influence over P.W. Services Limited (section 7(1)(c));
- (b) Piermont Corporation Limited because, as the 99% shareholder in Princes Wharf Management Limited, it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));
- (c) Wairangi Investments Limited because, as the 99% shareholder in Piermont Corporation Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));
- (d) Wairangi Holdings Limited because, as the 99% shareholder in Wairangi Investments Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));
- (e) David Stewart Henderson because:
 - (i) as the sole shareholder of 84% of the shares and joint shareholder of 16% of the shares in Wairangi Holdings Limited, he exceeds the 10%

threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)); and

- (ii) as the 100% shareholder in Electricity Direct Limited, he exceeds the 10% threshold in Section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) and, has a material influence over Electricity Direct Limited (section 7(1)(c)); and
- (f) Anthony Clive Sandlant because, as the joint shareholder in 16% of the shares in Wairangi Holdings Limited, he exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) of P.W. Services Limited.

Electricity Supply Businesses

20. Section 5 provides that:

- (1) For the purposes of this Act, "electricity supply business":
 - (a) means a business that:
 - (i) sells electricity in New Zealand ...
 - (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; ...
- (2) None of the following activities brings a person within subsection (1):
 - (a) selling or generating less than 2.5 GWh per annum;
 - (b) generating or selling electricity solely for its own consumption or for the consumption of its associates: ...

21. The following entities are electricity supply businesses under section 5 of the EIR Act:

- (a) P. W. Services Limited because it:
 - (i) sells electricity in New Zealand (section 5(1)(a)(i));

- (ii) owns, directly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)); and
 - (iii) owns, directly, the benefit of a contract to sell electricity (section 5(1)(c)(ii)); and
 - (iv) is not exempted from the meaning of "electricity supply business" through section 5(2);
- (b) Electricity Direct Limited because it:
- (i) sells electricity in New Zealand (section 5(1)(a)(i));
 - (ii) owns, directly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)); and
 - (iii) owns, directly, the benefit of a contract to sell electricity (section 5(1)(c)(ii)); and
 - (iv) is not exempted from the meaning of "electricity supply business" through section 5(2);
22. The electricity supply businesses identified in paragraph 21 above are involved for the purposes of section 7 of the EIR Act because they:
- (a) carry on their electricity supply businesses, either alone or together with their associates and either on their own or another's behalf (section 7(1)(a));
 - (b) exceed the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in their electricity supply businesses (section 7(1)(b));
 - (c) have material influence over their electricity supply businesses (section 7(1)(c)).
23. The following entities are also involved in the above electricity supply businesses:
- (a) Princes Wharf Management Limited because as the 100% shareholder in P.W. Services Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));
 - (b) Piermont Corporation Limited because as the 99% shareholder in Princes Wharf Management Limited it exceeds the 10% threshold in section 8 of the

EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));

- (c) Wairangi Investments Limited because as the 99% shareholder in Piermont Corporation Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over P.W. Services Limited (section 7(1)(c));
- (d) Wairangi Holdings Limited because as the 99% shareholder in Wairangi Investments Limited it exceeds the 10% threshold in section 8 of the EIR Act in terms control and equity return rights (section 7(1)(b)), and, under section 11(2), has a national influence over P.W. Services Limited (section 7(1)(c));
- (e) David Stewart Henderson because:
 - (i) as the sole shareholder of 84% of the shares and joint shareholder of 16% of the shares in Wairangi Holdings Limited, he exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)); and
 - (ii) as the 100% shareholder in Electricity Direct Limited, he exceeds the 10% threshold in Section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) and, has a material influence over Electricity Direct Limited (section 7(1)(c)); and
- (f) Anthony Clive Sandlant because, as the joint shareholder in 16% of the shares in Wairangi Holdings Limited, he exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) of P.W. Services Limited.

Summary

Prohibited Cross-Involvements

24. Accordingly Henderson seeks an exemption from the application of section 17 of the EIR Act in respect of the following entities with prohibited cross-involvements in relation to the Properties:

- (a) P W Services Limited;
- (b) Electricity Direct Limited;

- (c) Princes Wharf Management Limited;
- (d) Piermont Corporation Limited;
- (e) Wairangi Investment Limited;
- (f) Wairangi Holdings Limited;
- (g) David Stewart Henderson; and
- (h) Anthony Clive Sandlant.

Scope of the Application for Exemption

Part A: Permanent Exemption

- 25. Henderson seeks a short term exemption under section 81 of the EIR Act from the application of section 17 of the EIR Act until such time as the Commission determines the substantive grounds for a permanent exemption.
- 26. Pursuant to section 81 of the EIR Act, Henderson seeks a permanent exemption from the application of section 17 of the EIR Act.
- 27. In considering applications for an exemption under section 81 of the EIR Act, the Commission has stated that it will consider the following three questions. We address each question.

Question 1: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to inhibit competition in the electricity industry?

- 28. Henderson makes the following points:
 - (a) Henderson considers the relevant market is the national electricity retail market.
 - (b) If the Commission is prepared to grant the application for exemption, Henderson accepts that it should be on the following conditions:
 - (i) That Henderson or any other person in addition to complying with any other regulations or statutes regulating the charges which may be levied for lines use, only charge an amount made up of :

- (aa) the depreciation rate of the lines based on the purchase price of the lines;
- (bb) a minimal charge for the cost of compliance and completing financial accounts; and
- (cc) a charge for the actual cost of repairs and maintenance of the lines,

which amount shall be calculated on the basis of the number of end users of the lines and charged to the electricity supplier (whether one of the Henderson entities or a third party supplier) as a fee for access to the embedded lines.

- (ii) That Henderson or any other persons do not prevent access to any embedded electrical wiring systems owned or operated in relation to the Properties (and any future acquired properties to which the exemption will also apply), by any competing electricity supply business wanting to supply electricity to any of Henderson's tenants.
- (iii) Henderson or any other persons do not at any time enforce any of the existing lease clauses which allow the option of supplying electricity to any of Henderson's tenants, so that Henderson's tenants are free to choose their electricity supplier.
- (iv) That Henderson or any of the cross-involved entities provide all tenants of Henderson's properties and the owners/occupier of Hobson Street to whom they supply electricity with relevant electricity consumption and billing information, on a timely basis, to enable the tenants to assess competitive options for the supply of their electricity.

These steps will ensure that there is no opportunity for Henderson to inhibit competition in the relevant electricity retail market. As tenants and other customers will be free to choose their supplier, competition is promoted between electricity suppliers, for the right to supply the tenants and other customers.¹

- (c) Granting an exemption will also not create any real incentive for Henderson to inhibit competition in the electricity retail market. Any perceived incentives are either extremely minimal and/or theoretical. The nature of competition in the

¹

Henderson relies on the Commission's reasoning in decision number 351A.

commercial properties market is such that Henderson is, and will continue to be, motivated to keep tenants' and other customers electricity costs as low as possible. Henderson will want to promote competition which generally leads to lower prices. Henderson also has a policy of acting fairly and reasonably in relation to its tenants and to inhibit competition is not in accordance with that policy.

Question 2: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to cross-subsidise generation activities from electricity lines businesses?

29. There is no threat of this occurring, because Henderson is not involved in any generation activities.

Question 3: Would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between an electricity lines business and an electricity supply business which is not at arms length?

30. Henderson accepts that if an exemption is granted the relationship between the electricity supply businesses and the electricity lines businesses will not be at arms length. Henderson considers that if the Commission grants the application on the terms mentioned above, no anti-competitive consequences will arise from the absence of an arms length relationship because of the conditions that would form part of the exemption and the strong incentive on Henderson as a property owner to minimise its costs to tenants and other customers.

Part B: Three month exemption to comply with ownership separation rules

31. If the application for a permanent exemption is declined, Henderson applies for a three month exemption from the application of section 17 of the EIR Act (from the date of the Commission's decision to decline Part A of this application) to enable Henderson to comply with the ownership separation rules of the EIR Act.
32. In order for Henderson to cease being involved in either the electricity supply business or the electricity lines business, it will need time in which to:
- (a) restructure its current arrangements with electricity retailers, tenants and other customers so that it does not breach any relevant contracts; and

- (b) ensure that the tenants or new electricity retailers alter the relevant electricity supply equipment if necessary (such as meters) to accommodate the change in electricity operations.

33. Henderson expects that it will take three months to carry out these actions from the date of the Commission's decision to decline Part A of this application.

Part C: Future Business

34. Henderson's property investment business involves the ongoing development, sale and purchase of properties and/or companies owning properties.

35. Section 30 of the EIR Act prohibits a person from increasing its involvement in an electricity business, which includes the lines and supply businesses. So, each time Henderson acquires or develops a new property and/or company it will increase its involvement in an electricity lines business. In some circumstances Henderson, by acquiring or developing a new property and/or acquiring a new company, may also be in breach of section 18 of the EIR Act (20% aggregate cross-ownership prohibition).

36. Secondly, if the newly acquired property and/or company sells more than 2.5 GWh of electricity per annum, Henderson will have increased its involvement in the electricity supply business.

37. In either scenario Henderson would need to seek an exemption from the Commission each time it acquires or develops another building, large or small.

38. Henderson wishes to avoid having to seek an exemption each time it purchases or develops a new property and/or acquires a new company because of the compliance costs involved, and potential transactional delays, which could result otherwise.

39. Henderson seeks an exemption in respect of any business or involvement or interest in relation to any future property investment, development and management activities that Henderson might undertake and for that exemption to extend to any companies or entities related to Henderson. If the Commission is prepared to grant the application for exemption, Henderson accepts that it should be on the following conditions:

- (a) the terms and conditions as set out in paragraphs 28(b)(i)-(iv) above in relation to the exemption given to the cross-involved entities; and
- (b) that Henderson informs the Commission of the details of any future property investment and/or management activity, within 20 working days (as that term is defined in the Commerce Act 1986) from the day following the day it

undertakes the activity, that is likely to breach the EIR Act and for which Henderson and/or any other persons are likely to rely on the exemption.

Further Information

40. If the Commission requires any further information in relation to this application for exemption please contact either Russell McVeagh or Henderson. The relevant contact details are listed below.

41. **Russell McVeagh contact details**

Solicitor acting: Greg Thompson/Ed Crook
Telephone: (09) 367 8083/(09) 367 8378
Facsimile: (09) 367 8459
Email: greg.thompson@russellmcveagh.com/
ed.crook@russellmcveagh.com
Postal address: Vero Centre
48 Shortland Street
P O Box 8
Auckland

42. **Henderson contact details**

Contact: Robert Bell
Telephone: 09 308 9946
Facsimile: 09 308 9910
Email: RobertB@Kitchener.co.nz
Postal address: Level 1, Shed 24, Princes Wharf, 147 Quay Street,
P O Box 105 362, Auckland

Russell McVeagh
23 June 2004

DECLARATION

THIS APPLICATION is made by **David Stewart Henderson**

I hereby confirm that:

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

I undertake to advise the Commerce Commission immediately of any material change in circumstances relating to the application.

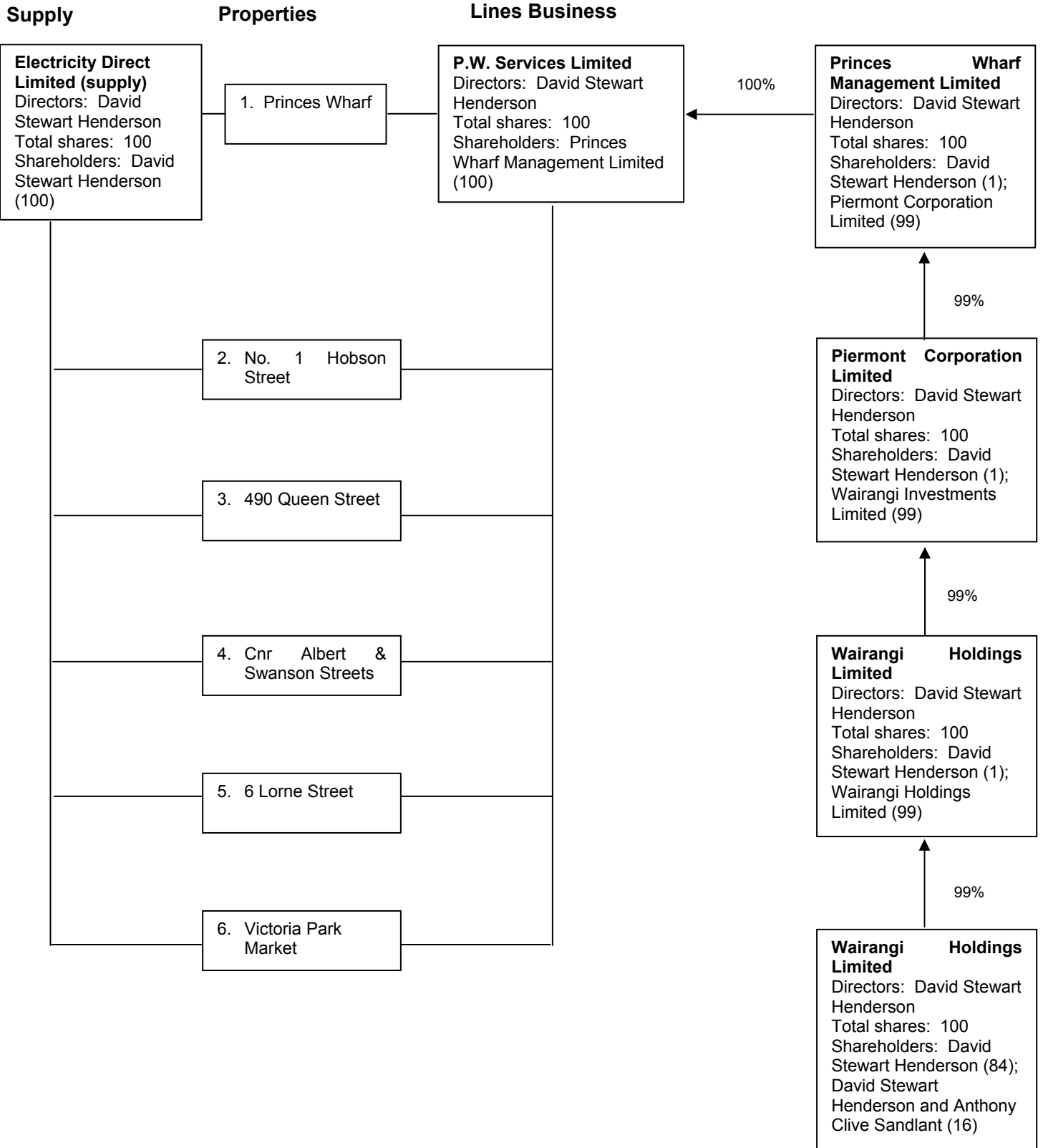
Date: 2004

Signed by:

David Stewart Henderson - Applicant

APPENDIX 1

**The relevant Henderson companies
Kitchener Group Corporate Structure**



Note: In respect of the Lines Businesses, David Henderson is listed as a person owning 10% of equity in the person carrying on the lines business and as a person exerting material influence over the person carrying on the lines business. This is also the case with the Supply Business.

Note: P.W. Services Limited also supplies electricity on Princes Wharf.

APPENDIX 2

Lease Clauses

490 Queen Street

The Lessee shall:

Duly and punctually to pay all charges for water, electricity, gas or other supplies or services relating solely to the Unit. It is specifically acknowledged that the Lessor may supply services (gas, water, telephone, electricity or other services) to Q Central at market rates, and as long as the Lessor is willing to supply these services, the Lessee must use and agree to pay for them.

Princes Wharf

The Lessee shall:

Duly and punctually pay all charges for water, electricity, gas, or other suppliers or services relating solely to the Flat.

No 1 Hobson

The Body Corporate shall ensure that Kitchener Group Limited or its nominee shall have the sole and exclusive rights to supply electricity to the building.