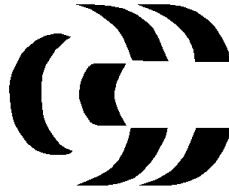


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COMMERCE COMMISSION

Decision No. 351A

Determination pursuant to the Electricity Industry Reform Act 1998 (the EIR Act), in the matter of an application for exemption of an involvement in an electricity lines business and an electricity supply business from the application of the EIR Act. The application is made by:

TRANS TASMAN PROPERTIES LTD

The Commission:

K M Brown
E C A Harrison
E M Coutts
P R Rebstock

Commission Staff:

S P Brown
A Mladenovic
K F Smith
A J Brice

**Summary of
Application:**

Trans Tasman Properties Ltd, which may be involved in an electricity lines business and an electricity supply business, seeks an exemption, pursuant to section 81 of the EIR Act, from the application of the EIR Act. This Decision addresses Parts B and C of the application.

Determination:

The Commission, pursuant to section 81 of the EIR Act, exempts Trans Tasman Properties Ltd from the application of section 17 of the EIR Act in relation to the conveyance and supply of electricity to the Finance Centre tenants.

Date of Determination:

6 May 1999.

Date of Exemption:

On publication of the Notice of Exemption in the *Gazette*.

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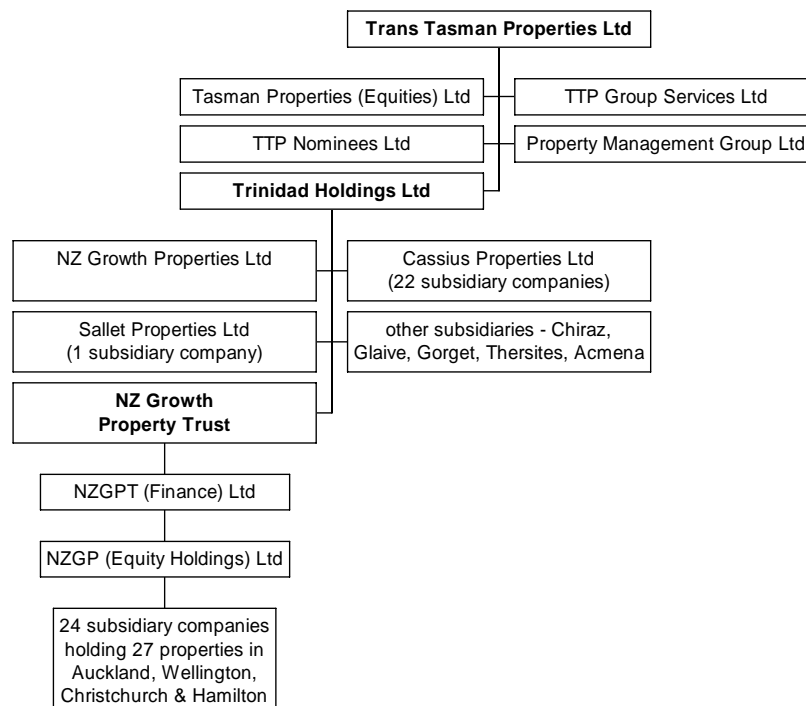
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INTRODUCTION

- 1 On 24 February 1999 the Commerce Commission (the Commission) received an application from Trans Tasman Properties Limited (TTP) for an exemption under section 81 of the EIR Act in respect of TTP and each of its subsidiaries (the TTP Group).
- 2 In a letter to the Commission of 26 March 1999, TTP, through its solicitors, clarified and extended the scope of the application.
- 3 The Commission's powers to exempt businesses, involvements or interests from the application of the EIR Act, or persons from compliance with any provisions of any regulations made under the EIR Act, are specified in section 81 of the EIR Act.

TRANS TASMAN PROPERTIES LTD

- 4 TTP is a public company listed on the New Zealand Stock Exchange. The TTP Group owns a large number of major Central Business District (CBD) properties in New Zealand. These properties are leased to tenants or are used by the TTP group for its own purposes.
- 5 The structure of the TTP Group is as follows:



- 6 Currently, the TTP Group holds 57 properties in New Zealand. The TTP Group holds 29 properties through the New Zealand Growth Property Trust investment portfolio, with a net lettable area of 196,851 square metres.¹ Through its other subsidiaries, the TTP Group holds a further 28 properties in New Zealand for disposal or re-development with a net lettable area of 69,777 square metres.

¹ Based on information provided by TTP.

operate air conditioning systems and building elevators or to light shared lobby areas. The cost of this electricity, along with general building running expenditure such as bulk cleaning and property insurance premiums, is recovered by the TTP Group from its tenants as an allocation of operating expenses based on floor space occupation.

- 11 The Commission considers that this second type of activity does not constitute an electricity supply business in terms of the EIR Act. The purchase of such electricity by TTP Group is to enable it to provide and maintain rental properties to a standard required by tenants, rather than for the purpose of direct consumption by tenants. The electricity is consumed by assets owned by, and not leased from, TTP Group. The recovery of the cost of this electricity by TTP Group does not, in the Commission's view, represent selling electricity but is instead the recovery of the costs of various services provided by TTP Group which are integral to managing and operating its rental properties, and for which, in some instances, electricity is a necessary input.
- 12 TTP is now proposing to act as an agent to arrange supply of electricity from an electricity retailer (designated electricity retailer) to various subsidiaries of TTP and those tenants of the TTP Group who request TTP to do so (the proposed agency arrangement). TTP aims to take advantage of the tenants' group buying power to arrange a better deal for electricity supply to each tenant than tenants could manage if they each acted alone. The total quantity of electricity for which TTP, as agent, is likely to negotiate supply will depend on the number of tenants who wish to purchase their electricity under the proposed agency arrangement. However, TTP estimates that it is likely to significantly exceed 2.5 GWh per annum.
- 13 TTP states that its involvement in the proposed agency arrangement "may well constitute TTP as an 'electricity supply business' due to the 'substance over form' provisions in the EIR Act".

Embedded Electrical Wiring Systems

- 14 In respect of electricity sold by NZGP to its tenants in the Finance Centre, the electricity is finally conveyed by the existing embedded electrical wiring systems within the properties which comprise the Finance Centre. TTP has stated that the TTP Group does not, and does not intend to, own or operate any electrical distribution system outside its properties.
- 15 Similarly, electricity not supplied by the TTP Group and electricity purchased by the TTP Group and used in providing common building services is conveyed for consumption by the existing embedded electrical wiring systems within the TTP Group's properties.
- 16 If the proposed agency arrangement proceeds, electricity will be finally conveyed to those tenants participating in the arrangement by the relevant existing embedded electrical wiring systems within the TTP Group's properties, as it currently is.
- 17 The Commission, in Decision 351,⁵ reached the preliminary view that TTP's ownership of and conveyance of electricity over its embedded electrical wiring system in the

⁵ Decision No. 351: *Trans Tasman Properties Ltd*, 1 April 1999.

Finance Centre amounts to TTP being involved in an electricity lines business in terms of the EIR Act.

THE EXEMPTION APPLICATION

18 TTP has sought an exemption under section 81 of the EIR Act for the TTP Group. The application describes the proposed agency arrangement and TTP's views on the implications of the EIR Act for that arrangement.

19 In the letter to the Commission of 26 March 1999, TTP, through its solicitors, clarifies and extends the scope of the application. In reference to the application, the letter states:

“1. The Application is for an exemption from the prohibition on cross-ownership contained within section 17 of the {EIR} Act, in relation to the proposed agency arrangement described in the Application (in relation to all of the properties – including the Finance Centre in Auckland). As stated in the Application, the exemption is sought as a precautionary measure should the Commission take the view that TTP and its subsidiaries (the ‘TTP Group’) constitute a lines business and that implementation of the proposed agency arrangement would be in breach of section 17 of the {EIR} Act.”

20 And, in reference to the supply of electricity to the Finance Centre:

“2. Although specific reference to the Finance Centre was not included in the Application, the now compressed time period for compliance under the {EIR} Act requires the current arrangement for the supply of electricity to the Finance Centre to be specifically addressed.”

21 In respect of dealing with the tenants of the Finance Centre, the letter states:

“4. TTP's intention for dealing with ... {NZGP's} obligation to sell electricity to Finance Centre tenants, has been to do so in one of the following ways:

- (a) In the event that the exemption applied for in the Application was granted in advance of the 31 March 1999 deadline {ie, if the cross-ownership prohibition in section 17 of the EIR Act is breached, the person who is in breach must have, by 1 April 1999, either effected ownership separation, so as not to be in breach of section 17, or else have complied with the corporate separation and arms length rules provisions contained in sections 24 and 25 of the EIR Act respectively} (or if the Commission considered that no exemption was required to permit the agency arrangements in ... {the Application}), ... {NZGP} would approach the Finance Centre tenants to suggest that they voluntarily agree to switch from the electricity on-sale arrangement under their leases, to the {proposed} agency arrangement. The pricing under the latter would be considerably cheaper than the former, and as a result ought to be more attractive to Finance Centre tenants; *or*
- (b) If, prior to 1 April 1999, the Commission either does not make a ruling on, or declines, the application, then ... {NZGP's} advice to the Finance Centre tenants (on the assumption that the Commerce Commission takes the view that ...{NZGP} is a lines business) would be that the electricity supply arrangements in their leases will be frustrated as from 1 April 1999 by the requirements of the {EIR} Act. ... {NZGP} would have then further advised that the sale of electricity by ... {NZGP} would cease prior to 1 April 1999 and that the tenants would need to make alternative arrangements for electricity supply (and that ... {NZGP} would provide whatever practical assistance it could in this regard); *or*
- (c) {NZGP} would leave the existing Finance Centre arrangements in place, on the basis that ... {NZGP} considers that it is not a lines business.”

22 As a consequence of NZGP selling electricity to the Finance Centre tenants, TTP has extended the scope of the application as follows:

“5. In order to avoid having to deal with the Finance Centre tenants in accordance with

paragraphs 4(a) or 4(b) above, and to guard against the possibility that the Commission may determine that the supply of electricity by ... {NZGP} to the Finance Centre tenants would be prohibited by section 17 of the {EIR} Act as at 1 April 1999, TTP wishes to broaden the scope of the Application in the following two ways (if the Commission determines that ... {NZGP} is a lines business):

- (a) First, we request that the Commission (pursuant to section 81 of the {EIR} Act) exempts ... {NZGP} from the prohibition contained in section 17 of the {EIR} Act, in relation to the supply of electricity to the Finance Centre, for the period from and including 1 April 1999 until the date which is 20 business days after the date on which the Commission provides its determination in relation to paragraph 5(b) below, in the event that:
 - (i) The Commission determines that the supply of electricity by ... {NZGP} to the Finance Centre is prohibited under section 17 of the {EIR} Act; and
 - (ii) The Commission does not grant the exemption sought under paragraph 5(b).
- (b) Secondly, we request that the Commission (pursuant to the Commission's powers under section 81 of the {EIR} Act) exempts ... {NZGP} from the prohibition contained in section 17 of the {EIR} Act, in relation to the supply of electricity by ... {NZGP} to the Finance Centre, either:
 - (i) Permanently; or
 - (ii) For 3 months, to allow the Finance Centre tenants to either:
 - (A) Decide whether they would like to purchase electricity under the proposed new agency arrangement, (ie if the Commission determines either that the proposed agency arrangement is not prohibited by section 17 of the {EIR} Act or, if it is prohibited, that it is nevertheless exempt pursuant to ... {the application}); or
 - (B) To make their own arrangements to purchase electricity, where the existing lease arrangements have been frustrated."

23 Taking into account both the application and the extended scope of the application, TTP's application for an exemption under section 81 of the EIR Act is summarised by the Commission in three parts as follows:

- **Part A**, whereby TTP sought and, in Decision 351, was granted a limited time exemption from section 17 of the EIR Act in relation to the supply of electricity to the Finance Centre tenants;
- **Part B**, whereby TTP seeks an exemption from section 17 of the EIR Act in relation to the supply of electricity to the Finance Centre tenants either permanently *or* for a period of three months; and
- **Part C**, whereby TTP seeks an exemption from section 17 of the EIR Act in relation to the proposed agency arrangement.

24 In Decision 351 the Commission reached the preliminary view that TTP (through NZGP) currently is, in relation to the supply of electricity to the Finance Centre tenants, both an electricity lines business and an electricity supply business and, accordingly, that section 17 of the EIR Act is applicable. The Commission, pursuant to section 81 of the EIR Act, granted TTP and its subsidiaries an exemption from section 17, with certain terms and conditions attached, in relation to the conveyance and supply of electricity to the Finance Centre tenants. The exemption given is for the period from 1 April 1999 until 5.00pm on the 20th working day (as defined in the Commerce Act 1986) following the date on which the Commission gives a determination in respect of Part B and Part C.

25 This Decision deals with Part B and Part C of the application.

COMMISSION PROCEDURES

- 26 For the purpose of considering TTP’s application for an exemption under section 81 of the EIR Act, the Commission, pursuant to section 58 of the EIR Act, which applies section 105 of the Commerce Act 1986 to the EIR Act, has delegated its powers under section 81 of the EIR Act to K M Brown, E C A Harrison, E M Coutts and P R Rebstock.
- 27 The Commission’s decision is based on an investigation conducted by its staff and their subsequent advice to the Commission, together with independent legal advice obtained by the Commission.
- 28 During their investigation into this application for exemption, Commission staff interviewed and obtained information from:
- Westfield and St Lukes Group;
 - AmTrust;
 - Colliers Jardine New Zealand Ltd;
 - The Property Council of New Zealand Inc (previously the Building Owners & Managers Association of New Zealand Inc); and
 - Trans Tasman Properties Ltd.

INVOLVEMENTS AND CROSS-OWNERSHIP PROHIBITION

- 29 Section 17 of the EIR Act provides:
- “(1) No person involved in an electricity lines business may be involved in an electricity supply business.
- (2) No person involved in an electricity supply business may be involved in an electricity lines business.”
- 30 In considering TTP’s application for an exemption under section 81 of the EIR Act it is necessary for the Commission to consider, in relation to both the supply of electricity to the Finance Centre tenants (Part B) and the proposed agency arrangement (Part C), whether TTP is, or would be, involved in an electricity lines business and an electricity supply business.

Electricity Lines Business

- 31 The EIR Act provides the meaning of “electricity lines business” in section 4:⁶
- “4. **Meaning of ‘Electricity Lines Business’** – (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.”

The Applicant’s Arguments

- 32 TTP states that, as building owner, it (through its subsidiaries) owns the existing embedded electrical wiring systems within each of the TTP Group’s properties. TTP

⁶ Section 4(2) of the EIR Act specifies certain activities which do not bring a person within section 4(1).

does not, and does not intend to, own or operate any electrical distribution system outside these properties. TTP does not consider that “the use of its electrical wiring systems, to supply electricity to tenants ... would constitute the TTP Group as an “electricity lines business” in terms of the EIR Act.” It therefore does not consider that it needs to apply for an exemption.

“TTP does not consider that the use of its electrical wiring systems, to supply electricity to tenants in the manner outlined above {ie: in relation to the proposed agency arrangement}, would constitute the TTP Group as an ‘electricity lines business’ in terms of the EIR Act. However, this is not entirely clear from the EIR Act. TTP contends that Parliament, in passing the EIR Act, did not intend to restrain in any way, a landlord from procuring a supply of electricity on behalf of its tenants. The object of the EIR Act is to prevent cross-ownership of electricity supply businesses on the one hand, and of public electricity distribution grids on the other.”

33 However, TTP acknowledges that it is not entirely clear from the EIR Act whether such activities may indeed constitute an electricity lines business.

“... the issue of whether TTP would be classified as an ‘electricity lines business’ (as defined in section 4 of the EIR Act) is unclear. Unlike other legislation (for example the Telecommunications Act 1987 and the now repealed Electricity Act 1968) the term ‘line’ is undefined within the EIR Act. This has made it difficult to determine whether the electrical wiring embedded within the structure of a building falls within the scope of ‘lines’ as that term is used in ... {section 4 of the EIR Act}. We believe that it was not Parliament’s intention that the EIR Act would cover embedded electrical wiring systems for two reasons:

- (a) The natural meaning of ‘lines’ is, in the context of the EIR Act, the sub-transmission (ie 100kV and 33kV) electrical distribution grid assets used by energy companies under the Electricity Companies Act 1992. The natural meaning of ‘electricity lines business’ in section 4(1)(b) of the EIR Act is, likewise, an energy company under the Electricity Companies Act 1992.
- (b) In section 4(1)(b), and elsewhere in the EIR Act, the words ‘or any other core assets of an electricity lines business’ make it plain that ‘lines’ include only those assets which are core assets of an energy company. We are unaware of an energy company which has, as a core asset, embedded electrical wiring systems which are physically separated from its sub-transmission grid by transformers and other similar fittings. We therefore do not believe that these embedded electrical wiring systems, within the TTP Group’s buildings, constitute ‘lines’ in terms of the EIR Act. As such, we do not believe that an exemption is required. However, as noted above, this application is filed on a precautionary basis in case the Commission does not share this view.”

34 In Decision 351 the Commission stated a preliminary view that TTP is involved in an electricity lines business. In reaching this view, the Commission had the benefit of considering the arguments of several property businesses regarding their views that the ownership and operation of embedded electrical wiring systems should not be considered as lines businesses in terms of the EIR Act. Principal amongst these has been Westfield New Zealand Ltd (Westfield) as manager of various shopping malls owned by St Lukes Group Ltd (St Lukes Group).

The Industry’s Arguments

35 Westfield is a property management company which manages the ten retail malls owned by St Lukes Group in New Zealand. Each mall is owned by a subsidiary company of St Lukes Group, and is responsible for buying electricity in bulk and distributing that electricity throughout its malls via the embedded electrical wiring systems in those malls. This situation is not dissimilar to TTP’s supply of electricity to the Finance Centre tenants or in respect of the proposed agency arrangement.

- 36 Westfield sought advice from Simpson Grierson and Beca Carter Hollings & Ferner Limited (Beca Carter).⁷ Neither Westfield nor St Lukes Group has sought an exemption under section 81 of the EIR Act.
- 37 St Lukes Group acknowledges that it is an electricity supply business in terms of the EIR Act in that it purchases electricity in bulk from local power companies and then on-sells that electricity to the tenants of each mall. Westfield argues that St Lukes Group is, however, not an electricity lines business in terms of the EIR Act.
- 38 Westfield argues that St Lukes Group:
- “only operates an electrical installation containing (in some cases) fixed wired appliances (ie transformers). St Lukes Group does not operate electric lines as the lines it owns are inside a building (ie the particular shopping mall) and so do not fall within the definition of the electric line in the Electricity Regulations 1997 or under the Electricity (Information Disclosure) Regulations 1994, and are in fact an electrical installation under the Electricity Act 1992. Transformers are clearly included within the definition of fixed wire appliance and so are distinct from an electric line and hence conveying electricity “by line” in section 4 of the Act. Further the ownership of a few transformers would not in our view in itself constitute the ownership of the “core assets” of an electricity lines business.”
- 39 Westfield also argues that the EIR Act is “clearly primarily directed at the electricity lines businesses currently operated by power distribution companies, such as Mercury Energy or Power New Zealand.” It argues that this is signalled in section 2(1)(c) of the EIR Act:
- “(c) effectively separating electricity distribution from generation and retail; ...”
- 40 Westfield therefore argues that electricity *distribution* is a reference to the large scale distribution carried out by power companies and that this is “quite different in nature from the type of wiring St Lukes Group uses to convey electricity to its tenants.”
- 41 Westfield states that as the EIR Act does not include a definition of *lines* in the definition of an electricity lines business, it is necessary to look at other legislation. It identifies:
- the Electricity Act 1992;
 - the Electricity Regulations 1993 (replaced);
 - the Electricity Regulations 1997; and
 - the Electricity (Information Disclosure) Regulations 1994.
- 42 Westfield considers that between the Electricity Act and its various regulations “one can ascertain the meaning of a “business that conveys electricity by lines...” and hence the definition of an “electricity lines business” for the purpose of the Act.”
- 43 The definition of an “electric line” in Electricity Regulations 1997:
- “means all conductors (including fittings supporting, or connected to, those conductors) whether above or below ground, that are used, or intended to be used, in or in connection with the supply of electricity from the outgoing terminals of a generating station, building, enclosure or other structure to:

⁷ The advice is in a letter from Simpson Grierson to Westfield dated 29 January 1999 and a letter from Beca Carter to Westfield dated 27 January 1999, and a letter from Simpson Grierson to the Commission on their advice to Westfield dated 17 March 1999, in relation to interpreting the meaning and application of “electricity lines business” to St Lukes Group. These documents were provided to the Commission.

- (a) The incoming terminals of any other building, enclosure or other structure; or
- (b) Any electrical appliance, in any case where the electrical appliance is supplied with electricity other than from a terminal in a building, enclosure, or other structure.”

- 44 Westfield interprets an “electric line” to be “the line from an electricity generator, which is initially the high voltage lines of the national grid, and then the lines owned by the local power company.” Westfield argues that a line “ceases to be an electricity line when it enters the “incoming terminals” of a building, enclosure or other structure.” Westfield’s engineering advisers, Beca Carter, consider that an incoming terminal of a building is a transformer or main switchboard.
- 45 Westfield considers that “it appears reasonable to conclude that an electric line terminates when it enters the transformer or main switchboard at each of the shopping centres owned by St Lukes Group. Therefore the electrical supply by St Lukes Group to its tenants is not caught by subsection (a) of the definition of electric line.”
- 46 Westfield further considers that the wiring servicing St Lukes Group’s tenants “cannot be characterised as a conductor used in connection with the supply of electricity to an “electrical appliance” outside a building.”
- 47 The Electricity Act 1992 defines an “electrical appliance” as:
 “any appliance that uses, or is designed or intended to use, electricity, whether or not it also uses, or is designed or intended to use, any other form of energy:”
- 48 Beca Carter suggest that subsection (b) of the definition of an “electric line” applies “to a situation where an “appliance” is directly connected to an {electricity supply authority’s} lines, eg pumping station, remote wharf crane, etc.”
- 49 Westfield considers that the lines St Lukes Group owns are an “electrical installation under the Electricity Act 1992”.
- 50 An “electrical installation” as defined by the Electricity Act 1992:
 “(a) Means all fittings
 (i) That form part of a system for conveying electricity; and
 (ii) That form part of such a system at any point from the point of supply to a consumer to any point from which electricity conveyed through that system may be consumed; and
 (b) Includes any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person’s use and not for supply to any other person; but
 (c) Does not include any electrical appliance.”
- 51 Westfield interprets an “electrical installation” to be “the fittings that form a system from the point of supply to the consumer (eg, a meter box) to any point where the electricity is actually consumed.” It therefore argues that the “wires owned by St Lukes Group within the shopping malls, fall within this interpretation of an electrical installation.”
- 52 Westfield argues that the transformers owned by St Lukes Group “are clearly included within the definition of fixed wire appliance and so are distinct from an electric line...”.
- 53 A “fixed wire appliance” as defined by the Electricity Regulations 1997:
 “means an electrical appliance, or a transformer, that is connected to the conductors of an

electrical installation other than by means of a plug and socket.”

- 54 Westfield considers the Electricity (Information Disclosure) Regulations 1994 (Information Disclosure Regulations) are relevant:

“These regulations require that companies that operate electricity lines businesses disclose their financial dealings so as to enhance competition. The regulations expressly state that the definition of “electric line” does not include “fixed wiring within the meaning of regulation 2(1) of the *electricity regulations 1993*”. The Electricity Regulations 1993 were the precursor to the Electricity Regulations 1997 and defined “fixed wiring” as meaning “conductors {i.e., wires} of an electrical installation within a building, connectable installation, enclosure, or other structure”. This clearly covers the wires owned and operated by St Lukes Group within the shopping malls.”

- 55 In addition, Westfield argues that the Information Disclosure Regulations also supports its view that St Lukes Group was not intended to be covered by the EIR Act. It argues that:

“these regulations require information disclosure of commercial dealings by electricity distribution and generation companies. The regulations expressly exclude small line owners from the ambit of the Regulations by virtue of section 24(4) which states that the Regulations requiring disclosure by line owners do not apply to any line owner where the total circuit length of the owner is less than 25 kilometres. The fact that the length if the line required is measured in kilometres indicates that the Regulations, and hence government’s {sic} concern about competition in the electricity sector, relate to distribution companies.”

- 56 AmTrust Pacific Ltd (AmTrust) is the holding company for a group of companies which own commercial real estate, principally office buildings, in Auckland, Wellington and Christchurch. AmTrust has at least one building in which it supplies electricity to tenants (in excess of 2.5 GWh per annum) over the building’s embedded electrical wiring system. AmTrust, like Westfield and St Lukes Group, considers the embedded electrical wiring systems are not “lines” for the purposes of the EIR Act and, therefore, that AmTrust does not own an electricity lines business.

- 57 AmTrust argues that the Electricity Regulations 1997, the Information Disclosure Regulations, and the Electricity Act 1992 include statutory definitions (as argued by Westfield) which:

“provide sufficient justification for AmTrust to conclude that the laws relating to electrical installations do intend to draw a distinction between “lines” which are essentially external to a building and supply the bulk of power to that building, and the wiring within that building which is across the ownership and responsibility barriers from the point of view of the supply of power. On that basis it can be validly argued, we believe, that the lines business ends at the incoming terminals of the building. The wires which supply the individual tenants’ distribution boards from the building transformer or main board are simply an integral part of the building structure and properly described as “fixed wiring” or “electrical installations” which are not lines and which therefore do not constitute the owner of the building as the owner of a “lines business”.”

- 58 AmTrust notes that it is not “a monopoly in the supply of electrical power to its tenants.” It states that “most of AmTrust’s buildings are in fact occupied by tenants who make their own arrangements with supply companies, utilising ... fixed wiring and separate meters.”

- 59 AmTrust states that:

“its “business” of supplying power to its tenants involves AmTrust in entering into an agreement with an electricity supply company for the purchase of bulk supply of electricity which is then consumed in AmTrust’s buildings by tenants and by the common areas. AmTrust invoices tenants for the power they consume, but is not acquiring the power for AmTrust’s own use, but beneficially for the use of the tenants. In that sense AmTrust is the trustee or nominee of the

various tenants (and therefore their “associate” in terms of the EIR Act) in acquiring the power and supplying it to them. In addition, it is clear that AmTrust in acquiring and supplying the power is at least likely to act in accordance with the wishes of the tenants and therefore to be the “associate” of those tenants in accordance with the second leg of the associate’s definition {12(1)(g)}.”

60 Section 4(2) of the EIR Act states:

“None of the following activities brings a person within subsection (1):

...

- (b) Conveying electricity solely for its own consumption or for the consumption of its associates:”

61 Section 12 of the EIR Act provides the meaning of “associate”:

“(1) For the purposes of this Act, person A is an “associate” of person B (and vice versa) if -

...

- (e) Person A is a nominee or trustee for person B in relation to interests in a business; or

...

- (h) Person A is a person who, in making a decision exercising a power materially affecting a business, is accustomed, or under an obligation, or proposes, or is likely, to act in accordance with the directions, instructions, or wishes of person B.

62 AmTrust does not seek “to impose a charge for the use of those lines and allows tenants, where they wish, the use of them for the purposes of a supply to the tenants’ business.”

63 AmTrust argues that “Any association of tenants into a bulk purchasing arrangement, organised by AmTrust, will be voluntary and AmTrust can be genuinely seen as the trustee or nominee of that group of tenants.”

64 AmTrust considers that “The purpose of the Act which is to allow free competition amongst the suppliers and hence a reduction in price to consumers is therefore served by the current arrangements without the requirement for the separation of a lines business from the supply business.”

Commission’s Analysis

65 The Commission has therefore considered whether a business that conveys more than 2.5 GWh per annum of electricity over an embedded electrical wiring system, of the type contained in a building, is a business that *conveys electricity by line* and thus is an electricity lines business in terms of the EIR Act.

66 In considering this issue, the Commission sought legal opinion from senior counsel (Counsel).

67 Counsel has advised the Commission that, in his view, Westfield and TTP are caught by the EIR Act. He has based this opinion on:

- the ordinary meaning of the word “line”;
- the purpose of the EIR Act;
- the structure of the EIR Act; and
- the lack of any clearly discernible technical meaning for the term “line” that could have been intended by Parliament to apply to this situation.

Ordinary Meaning

- 68 Counsel, in the absence of an express definition, considers that “the word ‘line’ should be given its ordinary meaning unless the context dictates otherwise or unless it can be shown that it was intended to have a technical meaning, which technical meaning is well defined.”
- 69 Counsel cites the *New Shorter Oxford English Dictionary* (1997) which defines line as:
 “1 a (piece of) rope, cord or wire, especially as serving a specified purpose ... g a telegraph or telephone wire or cable; a connection by means of this; an individual telephone number or extension. Also, any wire or cable serving as a conductor of electric current.”
- 70 He also cites the *Collins Concise Dictionary* (2 ed) which defines line, as far as it is relevant, as:
 “anything long and flexible and thin, such as wire or string; a washing line; a fishing line. 12. a telephone connection; a direct line to New York. 13. a conducting wire, cable or circuit for making connection between pieces of electrical apparatus, such as a cable for electric power transmission, telecommunications, etc.”
- 71 Counsel considers that “both dictionaries treat *wire* and *line* as interchangeable expressions and give definitions that would include wires within a building.”
- 72 When considering the context, Counsel notes that section 4(2)(a) of the EIR Act provides a quantitative exemption of 2.5 GWh per annum:
 “(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:”
- 73 He considers that, by implication, if more than 2.5 GWh of electricity is conveyed, the means of conveyance is caught. Additionally, in section 4(2)(d), the EIR Act refers to a “local distribution network”, which is not the term used in section 4(1).
 “(d) Conveying electricity (other than via the national grid) only from a generator to a local distribution network or from a local distribution network to a generator:”
- 74 Counsel considers that it follows from this that the term “line” in section 4(1) is intended to catch operations which are less than a local distribution network. Had this not been Parliament’s intention, he considers that Parliament would have used the words ‘local distribution network’ in section 4(1).
- 75 By ordinary meaning, and considering the context, the term “line” under the EIR Act must, in Counsel’s opinion, include the embedded wiring systems within buildings.

Purpose of the EIR Act

- 76 The overall purpose of the EIR Act is set out in section 2(1):
 “The purpose of this Act is to reform the electricity industry to better ensure that-
- (a) Costs and prices in the electricity industry are subject to sustained downward pressure; and
 - (b) The benefits of efficient electricity pricing flow through to all classes of consumers by –
 - (c) Effectively separating electricity distribution from generation and retail; and
 - (d) Promoting effective competition in electricity generation and retail.”

- 77 Counsel notes that one of the purposes of the EIR Act:
 “is that the benefits of efficient electricity pricing flow through to “all classes of consumers”. ... Given its natural meaning, this would include consumers who happen to be captive through being tenants of the mall. Why should they be prevented from access to a competitive source of electricity just because the mall operator requires them to take a bundled product.”
- 78 Counsel also notes a second purpose, that is “the separation of electricity distribution from generation and retail.” Counsel considers that:
 “It is clear that in the mall electricity enters at one point and then is distributed to a multiple of outlets separately owned. ... it is clear that it involves the distribution of electricity from the incoming terminal of the building through to the tenants’ own switchboards of which there are many. This must be “*distribution*” of electricity. There appears no warrant for reading down that expression so as to treat it as referring only to large scale distribution.”
- 79 The specific purposes of Parts 1 to 5 of the EIR Act are set out in section 2(2):
 “The purpose of this Act is to reform the electricity industry to better ensure that-
- (a) to prohibit certain involvements in electricity lines businesses and electricity supply businesses which may create incentives or opportunities –
 - (i) to inhibit competition in the electricity industry; or
 - (ii) to cross-subsidise generation activities from electricity lines businesses; and
 - (b) to restrict relationships between electricity lines businesses and electricity supply businesses which may otherwise not be at arms length.
- 80 Counsel notes that while section 2(2) starts with the term being interpreted, “if that purpose can be seen to be applicable to a {building owner}, then it is indicative that those situations were intended to be caught by the definition.
- 81 Counsel considers that where a building owner owns both the lines within a building and supplies electricity to the tenants of the building over those lines, there is clearly an opportunity for the building owner to restrict competition by either depriving the tenant of any choice of supply by requiring them to take supply from the building owner, or alternatively, by charging other competitive suppliers an excessive rate for access to and use of the embedded electricity system. While that may not be the intention of any particular building owner, “it is the potential rather than practice that must be considered.”
- 82 Counsel also notes section 14 of the EIR Act. This section requires that any question under Parts 1 to 5 of the EIR Act be determined “according to the nature, substance, and economic effect of the interest or relationship or other facts, and independently of form.” While section 14 sets out examples which are all related to corporate structures and business arrangements, Counsel considers it arguable that section 14 is aimed at:
 “preventing persons adopting artificial commercial arrangements for the purpose of circumventing the {EIR Act} rather than at bringing within the Act physical arrangements that are based on practical necessity and common sense. Nevertheless, while {section 14} may not directly apply, it is possible to deduce from that section the {the EIR Act} was intended to have wide effect.”
- 83 Counsel considers that “... the economic effect of the facts would suggest that {such a situation} should be caught by {the EIR Act}.”

Structure of the EIR Act

- 84 In Counsel’s view “the scheme of the EIR Act is to provide a wide prohibition qualified by:

- (a) certain express statutory exemptions;
- (b) further qualified by the power of the Governor General by Order in Council to grant additional class exemptions if the net has been cast to wide;
- (c) followed by the power for the Commission to grant specific exemptions if the benefit of forcing separation on any particular situation would outweigh the detriment.”

85 Counsel considers “this signifies a desire to have a wide net and to deal with the problems that then arise by way of exclusions and exemptions.”

86 Counsel also considers that “the {EIR Act} draws a distinction between conveyance of electricity and the supply at retail. Implicit is that all conveyance of electricity by a third party who is also selling that electricity is caught unless they are within a statutory exemption or are specifically exempted ...”.

Technical Meaning

87 Counsel notes that none of the definitions identified by Westfield uses the term “line”. The Electricity Regulations 1997 and the Information Disclosure Regulations both define the term “electric line”, albeit differently. Counsel considers that:

“It is really stretching the point to say that Parliament, when it enacted

- the definition of “electricity line {sic} business”;
- used the term “line” without defining it;
- included some express exemptions

intended the term “*lines*” to have the same meaning as a slightly different term defined in some subordinate legislation so as to include something that would be otherwise caught by the primary part of that definition in the subordinate legislation except that it was there expressly excluded!!”

88 Counsel considers that, given the differing definitions, “*electric line*” does not have a single commonly accepted meaning.

89 Counsel notes that the Electricity Act 1992 is expressly referred to in the EIR Act and defines “electricity distributor” to mean “a person who supplies line function services to any other person or persons.”

90 The Electricity Act 1992 defines “Line function services” to mean:

- “(a) The provision and maintenance of works for the conveyance of electricity;
- (d) The operation of such works, including the control of voltage and assumption of responsibility for losses of electricity.”

91 Counsel notes “There is a degree of circularity between “*works*” which include “*fittings*” but excludes part of an “*electrical installation*” which is defined to also include “*fittings*”.”

92 In the Electricity Act 1992, “works”:

- “(a) Means any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation, or conveyance of electricity; but
- (e) Does not include
- (f) Any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person’s use and not for supply to any other person; or
- (g) Any part of any electrical installation.”

- 93 The Electricity Act 1992 defines “fittings” to mean:
“everything used, or designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance, or use of electricity”
- 94 In the Electricity Act 1992, “electrical installation”:
“(a) Means all fittings
(h) That form part of a system for conveying electricity; and
(i) That form part of such a system at any point from the point of supply to a consumer to any point from which electricity conveyed through that system may be consumed; and
(j) Includes any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person’s use and not for supply to any other person; but
(k) Does not include any electrical appliance.”
- 95 Counsel considers that “the sense of it is that what is excluded are the internal parts of an installation. Not only may this not exclude {building owners} from the definition of “electricity distributor” and “line owner”⁸ ... it can be seen that to get to the end result requires an extended journey through the definition provisions of the Electricity Act 1992 beginning with expressions different from those actually in the {EIR Act}. Again, in the absence of express statutory direction it is unlikely Parliament intended such a complex and uncertain journey.”
- 96 Counsel notes that Part 6 of the EIR Act uses the term “line function services” from the Electricity Act 1992 and specifically, in section 93, provides “terms used in this Part are to be interpreted in accordance with the Electricity Act 1992.” He considers that “when parliament was enacting the {EIR Act} and wanted to expressly incorporate a definition from the Electricity Act 1992, it did so by using exactly the same term and then cross defining it. It did not do this in relation to s4. Therefore, by implication, it did not intend the definitions in the Electricity Act 199{2} of somewhat different terms to influence the interpretation of s4.”
- 97 Counsel concludes that:
“while there may be something in some of the legislation relating to electricity apart from the {EIR Act}, that supports the {building owners} argument, in my view, it is not strong enough to displace the natural meaning of the word “*line*” in the context and having regard to the purpose of the Act. I say that for the following brief reasons:
- (a) The legislation or Regulations being relied on do not use exactly the same expression yet, when the {EIR Act} wants to cross refer it does use the same term and then expressly cross refers;
 - (b) Further, those Acts and Regulations, although concerned with electricity, are not so closely concerned with the same subject matter as the {EIR Act} as to make it a necessary inference that when the legislature used a somewhat different term it intended to imply that it had the same meaning as that of the different term in other legislation;
 - (c) In any event, the other legislation is equivocal;
 - (d) Beca Carter do not contend that the word “line” of itself has a technical meaning so strong as to displace the natural meaning;
 - (e) The strongest support comes only in subordinate legislation and it is unlikely that Parliament intended the meaning of a fundamental term in the {EIR Act} to be

⁸ The Electricity Act 1992 defines “line owner” to mean “a person that owns works that are used or intended to be used for the conveyance of electricity:”

controlled by subordinate legislation.”

98 The Commission concurs with and adopts this advice.

Conveyance of Electricity

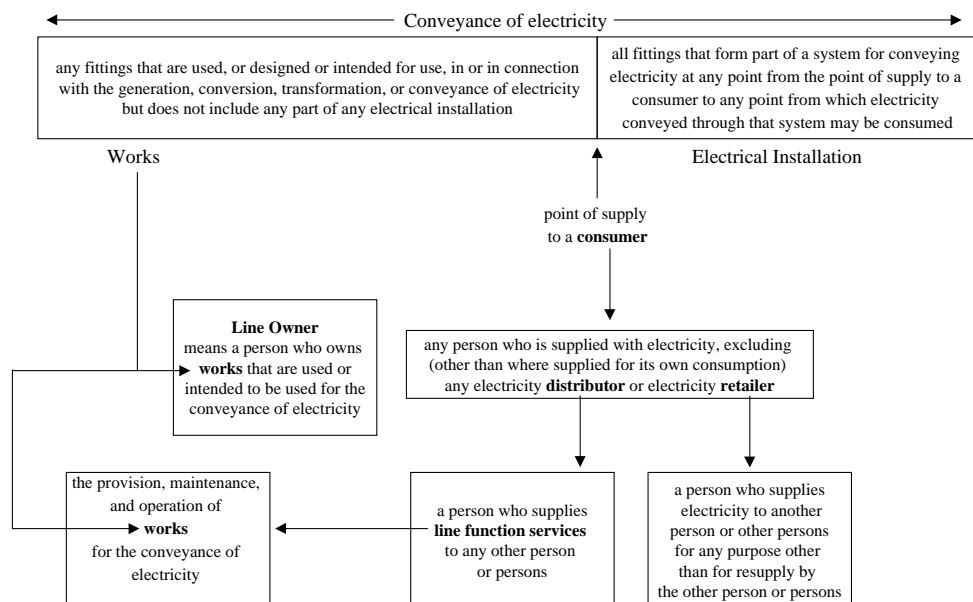
99 The EIR Act does not define “conveys electricity” but does identify electricity supply businesses, consisting of electricity generation businesses and electricity retailing businesses, as distinct from electricity lines businesses. It would therefore appear that the EIR Act contemplates that the movement of electricity between its point of generation and its point of consumption represents the conveyance of electricity.

100 The Electricity Act, also, does not define conveyance of electricity. It does, however, define “line owner” and “line function services”. A “line owner” is a person that owns “works” that are used or intended to be used for the conveyance of electricity and “line function services” are the provision, maintenance, and operation of “works” for the conveyance of electricity.

101 The Electricity Act defines ‘works’ as everything used in connection with the conveyance of electricity, excluding any works used in connection with the generation, conversion, or transformation of electricity, and any part of any “electrical installation”.

102 An “electrical installation” is also defined as a system for the conveying of electricity, but only from the “point of supply to a consumer” to any point where that electricity is consumed. The “point of supply to a consumer” represents the point at which a distributor or retailer provides final supply to a person who will consume the electricity.

103 The complex structure of these definitions, from the Electricity Act 1992, is shown below:



104 An “electrical installation” would begin at the point of supply to a consumer, that is a tenant. Any portion of an embedded electrical wiring system that continues beyond that point would be an “electrical installation” inside a building (fixed wiring), and therefore would not be an “electric line” in terms of the Information Disclosure Regulations.

- 105 The Electricity Act therefore appears to contemplate that conveyance represents all that is involved in moving electricity from its point of generation to the point at which the electricity is consumed, though excluding the conversion or transformation of electricity.
- 106 The Commission therefore considers that *conveys electricity* means the movement of electricity from one point to another. The Commission considers that TTP conveys electricity from the electricity's point of entry into TTP's buildings to the premises of individual tenants.

Conclusion on "conveys electricity by line"

- 107 The Commission has considered TTP's and the industry's arguments, and the ordinary and technical meaning of *conveys electricity by line*. It has further considered a purposive interpretation of the relevant provisions in the EIR Act, as well as the structure of the EIR Act. The Commission concludes that the embedded electrical wiring systems of building owners are conveying electricity by line for the purposes of the EIR Act.
- 108 TTP, through its subsidiaries, is the owner of an embedded electrical wiring system. In terms of the EIR Act it:
- owns a business that conveys electricity by line in New Zealand (s4(1)(a));
 - owns and operates, directly, lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)); and
 - has no activities exempted by section 4(2).
- 109 TTP:
- carries on an electricity lines business alone or together with associates (s7(1)(a));
 - exceeds the 10% threshold in terms of control and equity return rights in that business (s7(1)(b)); and
 - has material influence over that business (s7(1)(c)).
- 110 Therefore TTP is involved in an electricity lines business in terms of the EIR Act.

Electricity Supply Business

- 111 TTP, through its subsidiaries, currently purchases electricity in relation to TTP Group properties which it then:
- on-sells directly to Finance Centre tenants in accordance with the Deed of Lease in respect of each tenant (TTP or its subsidiaries do not currently sell electricity to any other TTP Group tenants); or
 - uses as an input in providing common building services (eg: air conditioning systems and building elevators) for the benefit of all tenants occupying its properties, and that is recovered from tenants, along with general building operating expenditure, as an allocation of operating expenses based on floor space occupation; or

- uses directly itself, where TTP (or its subsidiaries) is a tenant of its properties.⁹
- 112 TTP is contemplating supplying electricity to TTP Group tenants in the future in accordance with the proposed agency arrangement.
- 113 The Commission now considers whether TTP is an electricity supply business in relation to:
- the supply of electricity by TTP to the Finance Centre tenants (ie: in respect of that part of the application which is summarised by the Commission as Part B); and
 - the proposed agency arrangement (ie: in respect of that part of the application which is summarised by the Commission as Part C above).
- 114 In respect of the supply of electricity by TTP for the purpose of supplying common building services, the Commission considered in Decision 351 that such supply “does not constitute an electricity supply business in terms of the EIR Act”. The Commission stated at paragraph 11:
- “The purchase of such electricity by TTP is to enable it to provide and maintain rental properties to a standard required by tenants, rather than for the purpose of direct consumption by tenants. The electricity is consumed by assets owned by, and not leased from, TTP. The recovery of the cost of this electricity by TTP does not, in the Commission’s view, represent selling electricity but is instead the recovery of the costs of various services provided by TTP which are integral to managing and operating its rental properties, and for which, in some instances, electricity is a necessary input.”
- 115 The definition of “electricity supply business” is contained in section 5(1) of the EIR Act which provides:
- “5. Meaning of ‘electricity supply business’** – (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
 - (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.”
- 116 Section 5(2) of the EIR Act provides a number of exemptions from section 5(1):
- “(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

⁹ Nearly all of TTP’s lettable floor space is occupied by third parties. Section 5(2)(b) of the EIR Act exempts, from the definition of *electricity supply business* in section 5(1), the sale of electricity by a person solely for its own consumption or for the consumption of its associates.

consumption of its associates:

- (c) Generating electricity solely for the consumption of a local community, where -
 - (i) The generator is owned or operated by a business that also conveys electricity by line; and
 - (ii) Both those lines and that generator are not connected, directly or indirectly, to the national grid:
- (d) Selling electricity that is generated at a generator referred to in paragraph (c) or subsection (3):
- (e) Owning or operating, directly or indirectly, a generator referred to in any of paragraphs (b) to (d) or subsection (3) or any other core generation assets used in connection with those generators.”

Supply of Electricity to Finance Centre Tenants

117 TTP (through NZGP) currently purchases and on-sells electricity to the Finance Centre tenants under the lease agreements with those tenants. The amount of electricity sold is approximately [] GWh per annum, which exceeds the threshold of 2.5 GWh per annum, specified in section 5(2)(a) of the EIR Act.

118 An example of a clause from a Deed of Lease in respect of payment of utility charges by a Finance Centre tenant (the Lessee) was provided to the Commission and is, at least in effect, similar for all Finance Centre tenants. It reads as follows:

[

]

119 The Commission considers that, in respect of the supply of electricity by TTP (through NZGP) to the Finance Centre tenants, TTP is *involved* (in terms of section 7 of the EIR Act) in an *electricity supply business* (in terms of section 5 of the EIR Act). In this respect, TTP in terms of the EIR Act:

- sells electricity in New Zealand (section 5(1)(a)(i)), which it is contractually required to do so in terms of its lease agreements with the Finance Centre tenants; and
- is not exempted from section 5(1) because it sells greater than 2.5 GWh per annum of electricity to the Finance Centre tenants (section 5(2)(a)).

120 Further, TTP in terms of the EIR Act:

- carries on an electricity supply business alone or together with associates (section 7(1)(a));
- exceeds the 10% threshold in terms of control rights and equity return rights in that business (section 7(1)(b)); and
- has material influence over that business (section 7(1)(c)).

The Proposed Agency Arrangement

121 The proposed agency arrangement represents TTP’s intention to act as the agent of certain of its subsidiaries and those tenants of the TTP Group which request TTP to do

so, for the purpose of procuring the supply of electricity for those subsidiaries and tenants by an electricity retailer. TTP's objective behind the proposed agency arrangement is to achieve, through collective buying power, a better, more cost effective electricity supply deal than would otherwise be achieved by TTP and each of the TTP Group's tenants acting independently to arrange their supply of electricity. Under the proposed agency arrangement, TTP expects that the amount of electricity supplied will significantly exceed 2.5 GWh per annum.

- 122 In order to consider the question of whether TTP would be an electricity supply business if the proposed agency arrangement is implemented, and assuming that the amount of electricity supplied under the arrangement will exceed 2.5 GWh per annum, it is necessary for the Commission to first examine the precise nature of the proposed agency arrangement and TTP's role in that arrangement.
- 123 The proposed agency arrangement is intended to be governed by the *Electricity Supply Agreement* and the *Deed of Agency relating to Electricity Supply* (the Deed). Both the Electricity Supply Agreement and the Deed are currently only draft documents.¹⁰
- 124 The key features of the proposed agency arrangement as represented by the drafts of the Electricity Supply Agreement and the Deed are summarised below, insofar as they might be relevant to considerations in this Decision. This includes separately the key provisions of the *General Terms and Conditions of Supply*, which are contained by way of schedules (which are currently exactly the same) in drafts of both the Electricity Supply Agreement and the Deed.

Electricity Supply Agreement

- 125 The key provisions of the draft Electricity Supply Agreement can be summarised as follows:
- The Electricity Supply Agreement is an agreement between TTP and a designated electricity retailer under which the designated electricity retailer will supply delivered electricity (energy and line function services) to various subsidiaries of TTP which own the properties specified in the Electricity Supply Agreement, and to certain tenants of those subsidiaries (together, the customers) on the terms and conditions set out in the Electricity Supply Agreement;
 - There will be a separate contract between the designated electricity retailer and each of the customers (as specified in the Electricity Supply Agreement, the *Current Supply Request*) which will incorporate the General Terms and Conditions of Supply. TTP will at all times be deemed to be acting as the agent of the customers, in relation to each Current Supply Request, unless TTP advises the designated electricity retailer in writing to the contrary;
 - For so long as TTP is, or is deemed to be acting as, the agent of the customers, the designated electricity retailer will deal exclusively with TTP in relation to each Current Supply Request, except to the extent which the designated electricity retailer is reasonably required to deal directly with any of the customers or any person in order to give effect to a Current Supply Request;

¹⁰ The Commission has had the opportunity to review the latest versions of the draft documents which, in the case of the Electricity Supply Agreement, is the undated and unnumbered draft received by the Commission on 15 April 1999, and in the case of the Deed is the second draft dated 18 March 1999.

- Before a Current Supply Request is created in respect of any one of the customers, a Deed of Agency will be executed between TTP and the customer (which in practice will be the Deed of Agency relating to Electricity Supply mentioned earlier). The Deed of Agency is a deed which TTP (as agent) enters into with the customer (as principal) whereby the customer authorises TTP to procure a supply of electricity on the terms of the Electricity Supply Agreement on the customer's behalf.
- A Current Supply Request (ie: the contract between the designated electricity retailer and one of the customers, including the General Terms and Conditions of Supply) is created once the designated electricity retailer has accepted the obligation to supply electricity to the customer in accordance with the Electricity Supply Agreement. The designated electricity retailer is then required to send written notice to the customer including a copy of the General Terms and Conditions of Supply and a statement to the customer to the effect that those terms and conditions, together with the Current Supply Request, set out the basis of the designated electricity retailer's contract to supply electricity to the customer;
- The price payable by the designated electricity retailer to the owners of local electricity distribution networks in respect of line function services provided is required to be passed on to the customers at cost (without added margin by the designated electricity retailer) in setting the Electricity Charges (defined as the charges set out in attachment 1 to the General Terms and Conditions of Supply contained in the Electricity Supply Agreement);
- TTP has conditional absolute discretion to terminate the Electricity Supply Agreement if it considers that the designated electricity retailer has not used its best endeavours to enhance the quality of line function services provided to the customers under the Electricity Supply Agreement and to reduce the cost to the customers of those services;
- TTP or its nominee may purchase all or any of the metering equipment from the designated electricity retailer used to measure the quantity of electricity conveyed to the customers at any time during which the Electricity Supply Agreement is current. The purchase price for any metering equipment which TTP intends to purchase will be the lesser of the current book value and fully depreciated value in accordance with the Electricity Supply Agreement. Where any metering equipment which TTP intends to purchase is owned by a third party, then the designated electricity retailer must use its best endeavours to acquire clear title to such metering equipment from the third party for sale to TTP. The relevant clauses of the Electricity Supply Agreement dealing with the purchase of metering equipment by TTP will remain in full force and effect even upon termination of the Electricity Supply Agreement for whatever reason; and
- Either TTP or the designated electricity retailer may terminate the Electricity Supply Agreement without cause by written notice specifying the date of termination which, in the case of the designated electricity retailer, can not be less than 12 months after the date on which the notice is given, and, in the case of TTP, can not be less than 2 months after the date on which the notice is given.

Deed of Agency relating to Electricity Supply (The Deed)

126 The key provisions of the draft Deed can be summarised as follows:

- The Deed is made between either one of the subsidiaries of TTP or a tenant of one of those subsidiaries (the principal) and TTP (the agent). The principal authorises the agent to procure a supply of electricity to the principal from an *Electricity Retailer* (which means in the Deed an “Electricity Supply Business” as defined in the EIR Act), upon the terms and conditions set out in the Deed. More specifically, the principal appoints the agent to perform the *Agency Services* (as defined in the Deed) during the period the Deed is current, in accordance with the terms and conditions of the Deed;
- Agency Services means, *inter alia*, negotiation, entry into, and (where relevant) subsequent amendment of, a *Supply Agreement*, by the agent in the name of the principal. A Supply Agreement in terms of the Deed essentially means an agreement for the supply of electricity (including line function services) by an Electricity Retailer to the principal and includes either the General Terms and Conditions of Supply contained in a schedule to the Deed, or terms which have the same substantive effect, in all material respects, as those appearing in the General Terms and Conditions of Supply;
- TTP has the ability to amend the General Terms and Conditions of Supply contained in a schedule to the Deed, or to enter into a Supply Agreement on terms which differ in any material respect from the General Terms and Conditions of Supply, as set out in the Deed. TTP is not be authorised to make any such amendment unless the principal has agreed, or is deemed to have agreed, to the amendment in accordance with the Deed. If accepted by the principal, the amendment only binds the principal once the electricity retailer has accepted that amendment in writing;
- TTP may, at its discretion, charge the principal a fee for the performance by the agent of the Agency Services (agency fee). The agency fee will not exceed a percentage (not specified in the draft Deed) of the total reduction in the principal’s electricity costs (including energy and line function services) which results from the provision of the Agency Services, as reasonably determined by TTP;
- The principal waives any right it may have, against TTP (or any of its subsidiaries) in relation to any obligation which may have been imposed on TTP (or any of its subsidiaries) in relation to the supply of electricity, under any *Lease* (as defined in the Deed); and
- Either TTP or a principal may terminate the Deed without cause by written notice specifying the date of termination which, in the case of TTP, can not be less than 6 months after the date on which the notice is given, and in the case of the principal can not be less than 2 months after the date on which the notice is given.

General Terms and Conditions of Supply

127 The General Terms and Conditions of Supply are contained, currently in exactly the same form, in the draft versions of both the Electricity Supply Agreement and the Deed. In terms of the Electricity Supply Agreement, the General Terms and Conditions of Supply contained in the agreement are incorporated in the separate contract between the designated electricity retailer and the relevant customer (through TTP acting as the agent of the customer), represented by the Current Supply Request. In terms of the Deed, the Supply Agreement includes essentially the General Terms and Conditions of Supply contained in the Deed, or terms which have the same substantive effect as those appearing in the General Terms and Conditions of Supply. The key provisions of the

General Terms and Conditions of Supply, as they currently appear in the draft versions of both the Electricity Supply Agreement and the Deed, can be summarised as follows:

- The customer (being the person named in the Current Supply Request in respect of the supply of electricity) agrees to purchase, and the designated electricity retailer agrees to supply, delivered electricity (energy and line function services) in accordance with the agreement constituted by the Current Supply Request, which incorporates the General Terms and Conditions of Supply (the Agreement);
- The customer is required to pay the designated electricity retailer the Electricity Charges (as set out in an attachment to the Electricity Supply Agreement) for all electricity supplied to the customer. the designated electricity retailer will invoice the customer for all electricity supplied, and is required to separate out the energy and line function services components of the delivered electricity supplied;
- The designated electricity retailer is required to ensure that each agreement between it and owners of local electricity distribution networks in respect of the provision of line function services contains terms which affords protection to the customer in respect of the quality of line function services provided;
- The designated electricity retailer will ensure that the customer is able to contact the designated electricity retailer, 24 hours a day, 7 days a week, in relation to any fault which the customer may be experiencing in relation to the supply of electricity; and
- Either the designated electricity retailer or the customer may terminate the Agreement without cause by written notice specifying the date of termination which, in the case of the designated electricity retailer, can not be less than 6 months after the date on which the notice is given, and in the case of the customer can not be less than 2 months after the date on which the notice is given. However, if the customer’s electricity consumption is greater than 2 GWh per annum, then the customer’s notice period will be not less than the latter of either 2 months or the period to the next 1 April after the date on which the notice is given (however, in no case can the notice period for the customer be longer than 10 months after the date on which the notice is given.

128 Having considered the nature of the proposed agency arrangement, the Commission now considers whether TTP would be regarded as being an electricity supply business in terms of section 5 of the EIR Act, if the proposed agency arrangement is implemented.

129 At paragraph 4 of the application, TTP states that “the procurement by TTP (as agent) of the supply of electricity to the Consumers, although not technically a sale by TTP, may well constitute TTP as an ‘electricity supply business’ due to the ‘substance over form’ provisions in the EIR Act”. And, at paragraph 13 (under the heading “Is an Exemption Required?”), TTP merely states the necessary focus of any analysis in that “{i}t is clear that the act of selling electricity in excess of 2.5 GWh per annum will place TTP within the definition of ‘electricity supply business’ ...”.

130 The starting point must necessarily be the definition of “electricity supply business” as it appears in section 5(1) of the EIR Act. The relevant provisions of section 5(1) are:

“**5. Meaning of ‘electricity supply business’** – (1) For the purposes of this Act, ‘electricity supply business’ –

(a) Means a business that –

- (i) Sells electricity in New Zealand: ... 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

- 131 The EIR Act does not define *sells*, or any of its derivatives. The EIR Act does define:¹¹
- *business* which “means any undertaking that is carried on whether for gain or reward or not”;
 - *operating* (from which is presumably derived *operation*) which means “does not include the provision only of maintenance and related services”; and
 - *core assets* which means, “in relation to an electricity supply business, includes the assets referred to in section 5 (1) (c)”.

Sells Electricity in New Zealand

- 132 The *Concise Oxford Dictionary* (9 ed) defines *sell*, as far as it is relevant, as follows:
 “1 make over or dispose of in exchange for money.”

- 133 Similarly, the *Collins English Dictionary* (3 ed) and the *Webster’s New World Dictionary* (Third College Edition) define *sell* respectively, as far as it is relevant, as:

“1. to dispose of or transfer or be disposed of or transferred to a purchaser in exchange for money or other consideration; put or be on sale. 2. to deal in (objects, property, etc.): he sells used cars for a living.”

“1 to give up, deliver, or exchange (property, goods, services, etc.) for money or its equivalent 2 a) to have or offer regularly for sale; deal in ...”

- 134 Therefore, the ordinary meaning of *sell* indicates, firstly, a delivery, transfer or exchange (of goods, services etc.) between a seller and a buyer (or purchaser) and, secondly, that such delivery or exchange is for money or other consideration. This is consistent with section 3(1) of the Sale of Goods Act 1908 which provides:

“3. **Sale and agreement to sell** – (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called ‘the price’.”

- 135 The Commission considers that TTP would not be selling electricity in terms of the proposed agency arrangement. TTP would be acting as the agent of the consumers of electricity (being its subsidiaries and those tenants involved in the proposed agency arrangement) in procuring the supply of electricity from the electricity retailer, in terms of the Electricity Supply Agreement. TTP, in respect of the proposed agency arrangement, would not have at its disposal any electricity for delivery, transfer or exchange. Instead, the contract for selling and buying electricity is separately between the designated electricity retailer and each of the customers who are parties to the proposed agency arrangement. The customers’ contracts are in the form of the Current Supply Request (including the General Terms and Conditions of Supply) which would be arranged by TTP as agent of the customers.

¹¹ Section 3

- 136 In addition, the designated electricity retailer will invoice the customers for the electricity supplied, at rates set out in the Electricity Supply Agreement, and the customers are then required to pay the designated electricity retailer. The only payment that TTP is potentially able to receive in respect of the proposed agency arrangement is an agency fee from the customers for the performance by TTP of Agency Services, in accordance with the Deed. Although the agency fee will be calculated by a specified percentage (in the Deed), it is incentive or performance-based because the calculation base will be the customer's total reduction in electricity costs (both energy and line function services) which results from the provision of Agency Services. In addition, under the General Terms and Conditions of Supply it is the designated electricity retailer which is responsible for being contacted by electricity supply customers in relation to any faults.
- 137 Having concluded that TTP does not sell electricity in terms of section 5(1)(a)(i) of the EIR Act, it is necessary to extend the analysis of whether, in respect of the proposed agency arrangement, TTP would be an electricity supply business because of the application of sections 5(1)(c)(i) and/or 5(1)(c)(ii) of the EIR Act and/or because of the ability of TTP to potentially purchase metering equipment for itself from the designated electricity retailer (under the Electricity Supply Agreement), which may constitute ownership or operation of a "core asset" in terms of section 5(1)(c).

Ownership or Operation of a Customer Data Base

- 138 Section 5(1)(c)(i) of the EIR Act provides that the business of selling electricity includes the ownership or operation, directly or indirectly, of any core assets of an electricity retail business, which includes the customer data base relating to and used for the purposes of an electricity retail or electricity trading business.
- 139 In respect of the proposed agency arrangement, the Commission considers that TTP will not own or operate a customer data base as stated in section 5(1)(c)(i) of the EIR Act. It is the designated electricity retailer, and not TTP, which is required, in terms of separate contracts with each of the customers involved in the arrangement, to directly sell electricity and issue invoices to the customers and receive payments from the customers for that electricity. The designated electricity retailer, and not TTP, will keep a customer data base to enable the designated electricity retailer to sell electricity in this manner. TTP's data base in relation to the proposed agency arrangement will only relate to its obligations to procure the supply of electricity, acting as an agent, in accordance with the Electricity Supply Agreement and the Deed.

The Benefit of a Contract to Sell Electricity

- 140 Section 5(1)(c)(ii) of the EIR Act provides that the business of selling electricity includes the ownership or operation, directly or indirectly, of any core assets of an electricity retail business, which includes the benefit of a contract to sell electricity.
- 141 The Commission considers that, as a result of the proposed agency arrangement, TTP is likely to benefit in at least three ways:
- by reducing its operating costs relating to its own consumption of electricity as a result of being part of the bulk electricity supply deal with the designated electricity retailer, along with TTP's tenants who are part of the proposed agency arrangement;

- by being able to earn an agency fee for Agency Services provided in accordance with the Deed; and
- by being able to market a value added service (cheaper supply of electricity) to current and prospective tenants of its properties, thus helping to maintain or increase its occupancy rates.

142 However, the benefits which accrue, or are likely to accrue, to TTP do not, in the Commission's view, include the benefit of the contracts to sell electricity which exist under the proposed agency arrangement. TTP, as agent, neither has ownership nor is responsible for the operation, directly or indirectly, of such contracts or their benefits. The terms and conditions of the contracts are a matter between the supplier and the customers involved in the proposed agency arrangement. TTP merely acts as an agent of the customers in respect of those contracts.

Metering Equipment

- 143 The Electricity Supply Agreement enables TTP or its nominee to acquire all or any of the metering equipment owned by the designated electricity retailer and used in relation to the supply of electricity under the proposed agency arrangement. Further, where any metering equipment TTP intends to purchase is not owned by the designated electricity retailer but by a third party, the designated electricity retailer is required to use its best endeavours to acquire that metering equipment and on-sell it to TTP. TTP have stated that the reason it has drafted the clauses relating to metering equipment into the Electricity Supply Agreement is to ensure that the ownership of metering equipment is not used by the supplier as an obstacle to prevent TTP from switching to another electricity retailer should TTP choose to so do.
- 144 The question arises, therefore, whether the acquisition of any metering equipment by TTP from the designated electricity retailer in terms of the Electricity Supply Agreement would amount to TTP owning or operating a core asset of an electricity retail or electricity trading business (in terms of section 5(1)(c) of the EIR Act) and, accordingly, being an electricity supply business for the purposes of the EIR Act. In considering this question, it is the actual ownership or operation of metering equipment by TTP, rather than TTP's ability to potentially acquire metering equipment, which is at issue.
- 145 The Commission considers that metering equipment is not a "core asset" of an electricity retail or electricity trading business as envisaged by section 5(1)(c) of the EIR Act, unlike, for example, a customer data base used for the purposes of an electricity retail business. In the Commission's view, it is not a necessary condition of selling electricity to own or operate metering equipment. From the perspective of an electricity retailer, it is the measured consumption data which is important as the basis for issuing electricity invoices, carrying out reconciliations of consumption, providing management information, etc. The ownership or operation of metering equipment, and/or the measurement of the quantity of electricity supplied and the provision of that data to an electricity retailer, can be the responsibility of a third party.
- 146 The Commission notes that the use of metering equipment by any person as a means of preventing competition in electricity retailing, for example, by the imposition of unreasonable access terms, would place such behaviour at risk under the Commerce Act 1986.

Substance over Form

147 Section 14(1) of the EIR Act provides:

“**14. Substance matters, not form** – (1) Any question under Parts 1 to 5 is to be determined according to the nature, substance, and economic effect of the interest or relationship or other facts, and independently of form.”

148 The Commission considers that the nature, substance and economic effect of the proposed agency arrangement is such that TTP can not be regarded as an electricity supply business for the purposes of the EIR Act. TTP is an agent of the customers being supplied electricity in terms of the proposed agency arrangement. The contract for the supply of electricity to a customer, although arranged and negotiated by TTP as agent on behalf of the customer, is a transaction between the designated electricity retailer and the customer. The customer is free to choose to receive its electricity under the proposed agency arrangement or independently of the arrangement. Further, once in the proposed agency arrangement, a customer can choose to exit the arrangement in accordance with the contract with the designated electricity retailer (as specified in the General Terms and Conditions of Supply). The Commission accepts that, in substance, the aim of the proposed agency arrangement is to achieve a more cost effective electricity deal in respect of the supply of electricity to customers participating in the arrangement, rather than to circumvent the EIR Act.

Conclusion

149 The Commission notes that the facts revealed in TTP’s application are particular to its situation alone. The Commission cautions that in other situations, it is conceivable that an ‘agency agreement’ may be structured in such a way as to defeat the purposes of the EIR Act.

150 The Commission concludes that, in respect of the proposed agency arrangement (as currently contained in the draft versions of the Electricity Supply Agreement and the Deed), TTP would not be “involved” in an “electricity supply business”. In this respect, TTP, in terms of the EIR Act:

- would not sell electricity in New Zealand (section 5(1)(a)(i)); and
- would not own or operate, directly or indirectly, any core assets of an electricity retail business (section 5(1)(c));

151 The Commission considers that section 17 of the EIR Act would not therefore apply to TTP in respect of the proposed agency arrangement (as currently contained in the draft versions of the Electricity Supply Agreement and the Deed).

152 Accordingly, the Commission does not need to consider an exemption under section 81 of the EIR Act in respect of the application summarised by the Commission as Part C above.

153 However, in relation to the supply of electricity by TTP (through NZGP) to the Finance Centre tenants, the Commission considers that TTP and NZGP, in terms of the EIR Act:

- sells electricity in New Zealand (s5(1)(a)(i));
- owns and operates directly core assets of an electricity retail business which include a customer data base relating to and used for the purposes of an electricity

retail or electricity trading business and the benefit of contracts to sell electricity (s5(1)(c)); and

- has no activities exempted by section 5(2).

154 TTP and NZGP:

- carries on an electricity supply business alone or together with associates (s7(1)(a));
- exceeds the 10% threshold in terms of control rights and equity return rights in that business (s7(1)(b)); and
- has material influence over that business (s7(1)(c)).

155 Therefore, TTP and NZGP are currently involved in an electricity supply business in terms of the EIR Act.

156 The Commission concludes that TTP and NZGP, in relation to the supply of electricity by NZGP to the Finance Centre tenants, are involved in both an electricity lines and an electricity supply business. TTP will, after expiration of the exemption granted in Decision 351, have a prohibited cross-involvement, in terms of section 17 of the EIR Act.

CRITERIA USED BY THE COMMISSION FOR EXEMPTION APPLICATIONS

157 The EIR Act gives the Commission wide powers of enforcement, extension and exemption. To provide assistance to parties affected by the EIR Act, the Commission set out its role and processes in Practice Note No.3.¹²

158 The Commission stated in Practice Note No.3 that:

“The EIR Act provides for the Commission to make exemptions in terms of section 81 of the Act. In considering applications for exemptions, the Commission will have specific regard to the particular purpose of Parts 1 to 5 of the EIR Act as defined in section 2(2) of the EIR Act. The Commission is likely to grant an exemption in respect of a business or involvement or interest only where doing so:

- (a) would not result in certain involvements in electricity lines businesses and electricity supply businesses which may create incentives or opportunities:
 - (i) to inhibit competition in the electricity industry; or
 - (ii) to cross-subsidise generation activities from electricity lines businesses; and
- (b) would not result in relationships between electricity lines businesses and electricity supply businesses which are not at arms length.

In determining exemptions, the Commission will also have regard to the overall purpose of the EIR Act as set out in section 2(1) of the Act. That is, the purpose of the EIR Act is to reform the electricity industry to better ensure that:

- (a) costs and prices in the electricity industry are subject to sustained downward pressure; and
 - (b) the benefits of efficient electricity pricing flow through to all classes of consumers
- by –
- (c) effectively separating electricity distribution from generation and retail; and
 - (d) promoting effective competition in electricity generation and retail.”

¹² Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission’s Role and Processes.

159 The Commission noted in Practice Note No.3 that:

“...the EIR Act provides for maximum cross-ownership limits and specific structural and behavioural requirements to ensure that the purposes of the Act are met. Strict compliance with these limits and requirements is, other than in exceptional circumstances,⁽¹³⁾ expected.”

160 The Commission stated in Practice Note No.3 that:

“On receipt of an application in the proscribed form, the Commission will determine whether granting an exemption would be contrary to any element of the particular purpose of Parts 1 to 5 of the EIR Act or the overall purpose of the Act.

The Commission’s tests would necessitate obtaining and evaluating objective answers to the following three questions in relation to the particular purpose of Parts 1 to 5 of the EIR Act:

- 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?
- 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?
- 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?

In relation to these questions, the Commission will consider factors such as:

- Relevant market(s)¹⁴ within the electricity industry;
- The nature of any incentives or opportunities created;
- The temporal nature of any incentives or opportunities created;
- The nature of any relationship which is not at arms length; and
- The temporal nature of any relationship which is not at arms length.”

RELEVANT MARKET

161 The national electricity retail market appears relevant to the application of the Commission’s criteria to the facts of TTP’s Part B application for exemption.¹⁵

EXAMINATION IN TERMS OF THE COMMISSION’S CRITERIA

162 In respect of the proposed agency arrangement, the Commission has concluded that TTP would not be an “electricity supply business” for the purposes of the EIR Act. Accordingly, notwithstanding that TTP would be an “electricity lines business” in respect of the proposed agency arrangement for the purposes of the EIR Act, TTP would not be “involved” in terms of section 17 of the EIR Act. Therefore, the Commission is only required to consider, in terms of the criteria set down in Practice Note No. 3, a section 81 exemption from section 17 in respect of the supply of electricity to the Finance Centre tenants. In this situation TTP is involved in both an “electricity lines business” and “electricity supply business”. This situation is summarised by the Commission as Part B of the application.

¹³ For example, of the types provided for in section 19 of the EIR Act.

¹⁴ Defined using the same process as used for market definitions in respect of Commerce Act matters.

¹⁵ Other markets in the electricity industry, for example the wholesale electricity market, the electrical construction and maintenance market, the market for the reticulation of new subdivisions, the local distribution market, and the national electricity generation market, do not appear to be relevant to this application for exemption.

Incentives or Opportunities to Inhibit Competition in the Electricity Industry

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?

- 163 In respect of opportunities to inhibit competitive electricity supply, Parliament, in enacting the EIR Act, recognised that the market power of an electricity lines business provides varied mechanisms to inhibit competition in electricity retailing. Such mechanisms include:
- charges to electricity retailers for access to lines and contract administration charges over and above line charges;
 - cross-subsidies from line charges to electricity retail charges; and
 - delays in permitting electricity retailers access to lines through use-of-system agreement contractual arrangements.
- 164 TTP does not internally account for its embedded electrical wiring systems, nor does it impose any line charges for the conveyance of electricity across those systems. The embedded electrical wiring systems are part of the properties making up the Finance Centre, in respect of which TTP (through its subsidiary) charges lease rentals to tenants. Neither does TTP require use-of-systems agreements in respect of its embedded electrical wiring systems, including where tenants are supplied electricity directly by electricity retailers rather than by a TTP subsidiary (as in the case of the Finance Centre).
- 165 TTP (through NZGP) has an incentive to impose line charges (eg: additional profit) and/or contract administration charges (or the like), and has the opportunity to so do. However, if it was bound to continue to provide the services of its electricity lines business at no cost to its tenants, such incentives and opportunities would be significantly restricted.
- 166 Similarly, if it was bound to provide the services of its electricity lines business at no cost to its tenants, any incentives or opportunities to cross-subsidise from line charges to electricity retail charges would be significantly restricted.
- 167 TTP has not required other retailers to enter into use-of-system agreements. However, it is reasonable that TTP may, in future, require such agreements. If TTP (or one of its subsidiaries) attempted to prevent another retailer from supplying TTP Group tenants by, for example, not entering into a use-of-systems agreement for its embedded electrical wiring systems, TTP (and the relevant subsidiary) would be at risk under both the Commerce Act and the EIR Act.
- 168 The Commission notes that each tenant of the Finance Centre chooses, as part of its lease agreement, to have its electricity supplied by TTP. If a tenant now chooses to have its electricity supplied by another supplier, TTP must act, within the requirements of both the Commerce Act and the EIR Act, to enable such a transfer to occur.
- 169 This would include the provision by TTP to all tenants of relevant electricity usage and billing information, on a timely basis, to enable the tenants to solicit competing bids for electricity supply.

- 170 The Commission considers that, given continued provision of line services at no charge, reasonable access by other electricity suppliers to tenants of the Finance Centre, and the provision by TTP to all tenants of relevant electricity usage and billing information on a timely basis, the granting of an exemption from the application of the EIR Act, and in particular the requirement to comply with the ownership separation provisions, will not provide TTP with incentives or opportunities to inhibit competition in the national electricity retail market.

Incentives or Opportunities to Cross-subsidise Generation Activities

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?

- 171 TTP is not involved in electricity generation. Therefore, this criterion is not relevant to the Commission's analysis.

A Relationship Not at Arms Length

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?

- 172 TTP (with its subsidiaries) proposes to continue to own and operate both an electricity lines business and an electricity supply business. The two businesses will have common managers, premises and records. Managers will make decisions about both line and supply pricing and also about the terms for the granting of access to TTP's network by electricity retailers who wish to compete with TTP's electricity supply business. The relationship between TTP's electricity lines and supply businesses will not be at arms length.
- 173 However the Commission considers that the potential effects of the relationship not being at arms length can be tempered by the fact that TTP (through its subsidiaries) supplies line services, to all the consumers it supplies with electricity, at no charge. If bound to continue to not charge for line services, TTP (with its subsidiaries) is restricted in its ability to use the existence of a relationship not at arms length to defeat the purposes of the EIR Act. As a result, the Commission does not consider the potential effects of the relationship not being at arms length to be a material risk to the purposes of the EIR Act.

THE COMMISSION'S DECISION

- 174 The Commission has concluded that, while TTP is an electricity lines business for the purposes of the EIR Act, TTP is not an electricity supply business in relation to the proposed agency arrangement. Accordingly, there is no requirement for TTP to be granted an exemption under section 81 of the EIR Act from section 17 of the EIR Act in respect of the proposed agency arrangement.

- 175 Therefore, this Decision deals only with Part B of TTP's application for an exemption under section 81 of the EIR Act. TTP's application given continued provision of line services at no charge, reasonable access by other electricity suppliers to tenants of TTP properties, and the provision by TTP to all tenants of relevant electricity usage and billing information on a timely basis,, passes two of the three criteria used by the Commission to decide upon exemptions from the EIR Act. The third is not applicable.
- 176 In making its decision the Commission notes that the facts revealed in TTP's application are particular to its situation alone. The Commission also notes that section 81(5) provides that the Commission may vary or revoke any exemption at any time.
- 177 Therefore, having considered the stated criteria, the Commission exempts TTP and its subsidiaries from the application of section 17 of the EIR Act in relation to the conveyance and supply of electricity to the tenants of the Finance Centre, subject to the terms and conditions specified in the Notice of Exemption.

NOTICE OF EXEMPTION

The Commission, pursuant to section 81 of the EIR Act, exempts Trans Tasman Properties Ltd and its subsidiaries from the application of section 17 of the EIR Act in relation to the conveyance and supply of electricity to the tenants of the Finance Centre.

The exemption is subject to the following terms and conditions:

- (a) That neither Trans Tasman Properties Ltd nor any of its subsidiaries introduce a charge to any person for the use of, or related to, an electricity lines business in relation to the supply of electricity to the tenants of the Finance Centre.
- (b) That Trans Tasman Properties Ltd or its subsidiaries not prevent access, on reasonable terms and on a timely basis, to any embedded electrical wiring systems they own in relation to the Finance Centre by any electricity supply business wanting to supply electricity to the tenants of the Finance Centre.
- (c) That Trans Tasman Properties Ltd or its subsidiaries provide all tenants of the Finance Centre 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.
- (d) That if Trans Tasman Properties Ltd or any of its subsidiaries enters into any new, or materially changes its current, contracts, arrangements, or understandings with the tenants of the Finance Centre or their assigns in relation to the conveyance or supply of electricity, Trans Tasman Properties Ltd notifies the Commission.

The exemption takes effect from the date of publication of this notice in the *Gazette*.

The Commission may vary or revoke this exemption at any time in accordance with section 81(5) of the EIR Act.

Dated this 6th day of May 1999

The Commission

NOTICE OF REVOCATION

The Commission, pursuant to section 81 of the EIR Act, revokes the exemption granted in Decision 351 dated 1 April 1999 and published in the *Gazette* on 8 April 1999, to Trans Tasman Properties Ltd and its subsidiaries from the application of section 17 of the EIR Act in relation to the conveyance and supply of electricity to the tenants of the Finance Centre.

The revocation takes effect from the date of publication of this notice in the *Gazette*.

Dated this 6th day of May 1999

The Commission