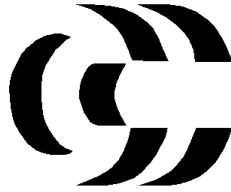


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COMMERCE COMMISSION

Decision No. 351

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
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 (Parts B and C of the application) and an interim time extension (Part A of the application). This Decision addresses Part A of the application.

Determination:

The Commission, pursuant to section 81 of the EIR Act, exempts Trans Tasman Properties Limited from the application of section 17 of the EIR Act in relation to the conveyance and supply of electricity to the Finance Centre tenants for the period from 1 April 1999 until 20 working days following the date on which the Commission gives its determination in respect of Parts B and C of Trans Tasman Properties Ltd's application for exemption.

Date of Determination:

1 April 1999.

Date of Exemption:

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

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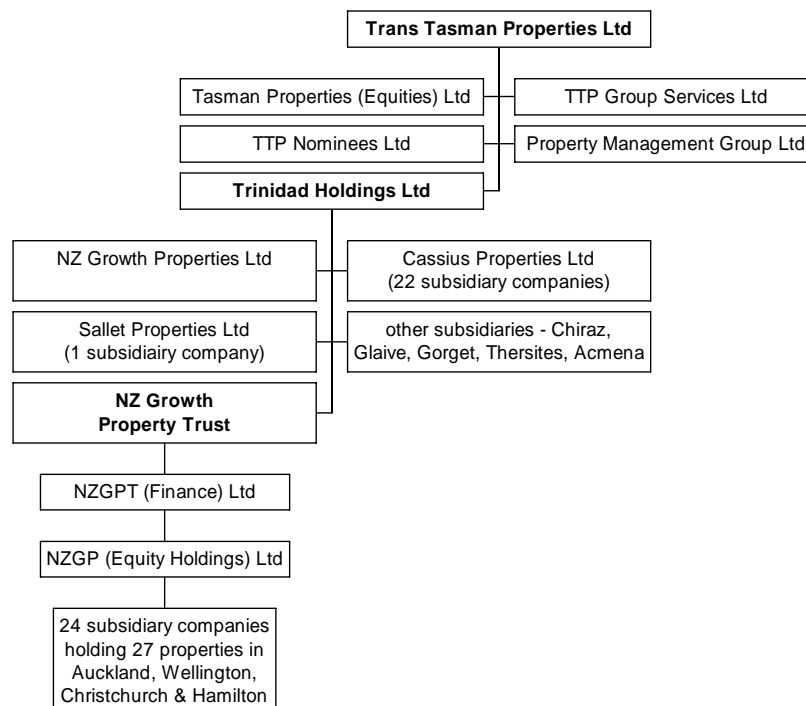
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INTRODUCTION

- 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 LIMITED

- 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 29,777 square metres.

¹ Based on information provided by TTP.

of this electricity, along with general building running expenditure such as bulk cleaning and property insurance premiums, is recovered by TTP 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 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.
- 12 TTP is now proposing to act as an agent to arrange supply of electricity from an 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 estimate 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". The Commission will consider whether TTP's involvement, as an agent, in the supply of electricity to its tenants under the arrangement amounts to TTP being an electricity supply business in the substantive part of the Commission's decision.

Embedded Electrical Wiring Systems

- 14 In respect of electricity sold by TTP 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 it intend to, own or operate any electrical distribution system outside of its properties.
- 15 The Commission has reached the preliminary view that TTP's ownership of and conveyance of electricity over its embedded electrical wiring system in the Finance Centre amounts to TTP being involved in an electricity lines business in terms of the EIR Act.

INVOLVEMENTS

Electricity Lines Business

- 16 TTP is the owner of an embedded electrical wiring system. In terms of the EIR Act it may:
 - own a business that conveys electricity by line in New Zealand (s4(1)(a));

- own and operate, directly, lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)); and
- have no activities exempted by section 4(2).

17 TTP may:

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

18 Therefore TTP may be involved in an electricity lines business in terms of the EIR Act. TTP argues it is not involved in an electricity lines business. The Commission has reached the preliminary view that TTP is involved in an electricity lines business.

Electricity Supply Business

19 TTP 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).

20 TTP:

- 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)).

21 Therefore, TTP is also currently involved in an electricity supply business in terms of the EIR Act. TTP agrees with this interpretation.

CROSS-OWNERSHIP PROHIBITION

22 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.”

23 The Commission has reached the preliminary view that TTP is involved in both an electricity lines and an electricity supply business. TTP will, after 1 April 1999, have a prohibited cross-involvement, in terms of section 17 of the EIR Act.

THE EXEMPTION APPLICATION

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

25 The letter to the Commission of 26 March 1999 from TTP, through its solicitors, clarifies and extends the scope of the Application. TTP states in reference to the application:

“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.”

26 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.”

27 In respect of dealing with the tenants of the Finance Centre, TTP states:

“4. TTP’s intention for dealing with ... {its} 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}), ... {TTP} 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 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 ... {TTP’s} advice to the Finance Centre tenants (on the assumption that the Commerce Commission takes the view that ...{TTP} 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. ... {TTP} would have then further advised that the sale of electricity by ... {TTP} would cease prior to 1 April 1999 and that the tenants would

need to make alternative arrangements for electricity supply (and that ... {TTP} would provide whatever practical assistance it could in this regard); *or*

- (c) {TTP} would leave the existing Finance Centre arrangements in place, on the basis that ... {TTP} considers that it is not a lines business.”

28 As a consequence of TTP selling electricity to the Finance Centre tenants, it has extended the scope of the Application. In this respect, TTP states:

“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 ... {TTP} 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 ... {TTP} is a lines business):

- (a) First, we request that the Commission (pursuant to section 81 of the {EIR} Act) exempts ... {TTP} 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 ... {TTP} 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 ... {TTP} from the prohibition contained in section 17 of the {EIR} Act, in relation to the supply of electricity by ... {TTP} 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.”

29 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 in three parts:

- **Part A**, whereby TTP seeks a limited time exemption from section 17 of the EIR Act in relation to the supply of electricity to the Finance Centre tenants, if the Commission determines that TTP is an electricity lines business and that the supply of electricity by TTP to the Finance Centre tenants is prohibited under section 17. This exemption is sought for the period from and including 1 April 1999 until 20 working days⁵ following the date on which the Commission gives its determination in respect of Part B below (the time extension);
- **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.

⁵ As defined in section 2(1) of the Commerce Act 1986.

- 30 This Decision deals solely with Part A of TTP's exemption application because of the urgency of Part A in relation to the key date of 1 April 1999 and also because Part B and Part C will not be considered by the Commission until after 1 April 1999.

COMMISSION PROCEDURES

General

- 31 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.
- 32 The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

Criteria Used by the Commission to Consider Exemption Applications

- 33 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.3.⁶

- 34 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 EIR 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 EIR Act. That 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.”

- 35 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 EIR Act are met. Strict compliance

⁶ Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission's Role and Processes.

with these limits and requirements is, other than in exceptional circumstances,⁽⁷⁾ expected.”

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

“On receipt of an application 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 EIR 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?; and
- 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 markets 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

37 The national electricity retail market appears relevant to the application of the Commission’s criteria to the facts of TTP’s Part A application for exemption.⁸

EXAMINATION IN TERMS OF THE COMMISSION’S CRITERIA

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?

38 The tenants of the Finance Centre have long-term leases with TTP. It appears unlikely that TTP can alter the terms or conditions of the leases during the period of the time extension to, for instance, increase any electricity charges (lines or supply). However, the opportunity exists. Additionally, while TTP could frustrate another retailer from supplying any of the Finance Centre tenants during the period of the time extension, it appears unlikely that any of the tenants would seek such alternate supply at this time.

39 The Commission considers an effective extension of the date until TTP must comply with the ownership separation rules may create incentives or opportunities for TTP to inhibit competition in the national electricity retail market, but that these would not be more than minimal.

⁷ For example, of the types provided for in section 19 of the EIR Act.

⁸ 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 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?

- 40 TTP has no generation activities and therefore this question is not relevant to this application.

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?

- 41 A relationship which is not at arms length, which may be permitted by an exemption, can only exist for the duration of the time extension. Whether a permanent exemption from the ownership separation rules would permit a relationship which is not at arms length will be determined by the Commission in its consideration of Parts B and C of the exemption application.
- 42 The Commission considers that an effective extension of the date until which TTP must comply with the ownership separation rules would permit a relationship which is not at arms length, but that the effect during the time extension would not be more than minimal.

THE COMMISSION'S DECISION

- 43 This Decision deals only with Part A of TTP's application for an exemption under section 81 of the EIR Act. TTP's application passes two of the three criteria used by the Commission to decide upon exemptions from the EIR Act. The third is not applicable.
- 44 The Commission notes that section 81(5) provides that the Commission may vary or revoke any exemption at any time.
- 45 Therefore, having considered the stated criteria, the Commission exempts TTP, for a limited period, 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) The exemption applies from 1 April 1999 until 5pm on the 20th working day (as defined in section 2(1) of the Commerce Act 1986) after the day of release of the Commission's decision on Parts B and C of Trans Tasman Property Ltd's exemption application.
- (b) That if Trans Tasman Properties Ltd or its subsidiaries commences supplying electricity to other than the current tenants of the Finance Centre or their assigns it notifies the Commission.
- (c) That if Trans Tasman Properties Ltd or 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, it notifies the Commission.
- (d) That Trans Tasman Properties Ltd and its subsidiaries shall be in full compliance with section 17 of the EIR Act on expiration of this exemption.

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 1st day of April 1999

The Commission