



## COMMERCE COMMISSION

### Decision No. 402

Determination under the Electricity Industry Reform Act 1998 (“the EIR Act”), in the matter of an application for exemption of involvements in both an electricity lines business and an electricity supply business from the application of the EIR Act. The application is made by:

**TOWER LIMITED;  
TOWER LIFE NEW ZEALAND LTD; and  
TOWER PROPERTY NOMINEES LTD**

**The Commission:** E C A Harrison

**Commission Staff:** D R Ainsworth

**Summary of Application:** Tower Limited and two of its subsidiaries seek an exemption under section 81 of the EIR Act, from the application of section 17 of the EIR Act.

**Determination:** The Commission, pursuant to section 81 of the EIR Act, exempts Tower Ltd and Tower Property Nominees Ltd from the application of section 17 of the EIR Act in relation to a prohibited cross-involvement in an electricity lines and an electricity supply business. Tower Life New Zealand Ltd is not cross-involved in an electricity lines and an electricity supply business. The exemption is subject to the conditions stated in this decision.

**Date of Determination:** 18 January 2001

**Date of Exemption:** On publication of the Notice of Exemption in the *New Zealand Gazette*.

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## INTRODUCTION

- 1 On 11 August 2000 the Commerce Commission (“the Commission”) received an application from Tower Ltd and its subsidiaries, Tower Life New Zealand Ltd and Tower Property Nominees Ltd, for exemption from the application of section 17 of the EIR Act.
- 2 The three Tower companies sought an exemption from the application of section 17 of the EIR Act in respect of cross-involvements in electricity lines and electricity supply businesses. These cross-involvements arise as a result of Tower Ltd and its subsidiaries’ ownership of electricity lines within commercial property together with the sale of electricity to some lessees of that property. Section 17 prohibits any person involved in an electricity lines business from being involved in an electricity supply business and vice versa. Those businesses are defined in sections 4 and 5 of the EIR Act
- 3 The Commission’s powers to exempt any 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 pursuant to section 81 of the EIR Act.

## TOWER LTD

- 4 Tower Ltd is a New Zealand-based company which provides insurance products and superannuation services. Included in its investments are 11 commercial properties.
- 5 Tower Ltd has three property owning subsidiaries:
  - Tower Life New Zealand Ltd owns the company’s head office building in central Wellington which has Tower Ltd and a large legal practice as its only occupants. It also owns some vacant land and staff holiday homes;
  - Tower Property Nominees Ltd owns all but one of Tower Ltd’s commercial property portfolio (see Appendix 1), part of which is the Merivale Mall in Christchurch; and
  - Tower Corporation Holdings Ltd owns executive residential accommodation in Wellington.

## TOWER’S ELECTRICITY LINES BUSINESS

- 6 Tower Ltd and its three subsidiaries own and operate electricity lines in New Zealand, those lines being the electrical reticulation within the companies’ properties. Tower Ltd is unable to state the quantity of electricity its subsidiaries convey to the large number of its tenants who are supplied with electricity by other parties because Tower Ltd has no access to those tenants’ electricity meter readings.
- 7 However, Tower Ltd is able to confirm that:
  - Tower Property Nominees Ltd currently conveys [ ] gigawatt-hours per annum at Merivale Mall<sup>1</sup> plus a large additional amount of electricity to its tenants in other buildings who have their own electricity supplier<sup>2</sup>;

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<sup>1</sup> And conveys about [ ] gigawatt-hours per annum if the Mall becomes fully tenanted.

<sup>2</sup> Commission staff have estimated this additional amount conveyed is about [ ] gigawatt-hours per annum.

- Tower Life New Zealand Ltd currently conveys [ ] gigawatt-hours per annum at the Wellington head office building of Tower Ltd plus a small additional amount at three staff holiday homes<sup>3</sup>; and
- Tower Corporation Holdings Ltd conveys a small amount of electricity at one executive residential accommodation building owned by it<sup>4</sup>.

## **TOWER'S ELECTRICITY SUPPLY BUSINESS**

8 The majority of the tenants of the properties, owned by Tower Ltd and its subsidiaries, have independent electricity suppliers except that:

- Tower Life New Zealand Ltd supplies [ ] gigawatts per annum of electricity to Phillips Fox, a tenant in the Tower Group's head office; and
- Tower Property Nominees Ltd supplies about [ ] gigawatt-hours per annum to its tenants at Merivale Mall<sup>5</sup>.

## **INVOLVEMENTS**

### **Electricity Lines Businesses**

9 Tower Ltd and its three property owning subsidiaries are the owners of electricity lines in New Zealand. In terms of the EIR Act they:

- own a business that conveys electricity by line in New Zealand (s4(1)(a)); and
- own and operate, directly or indirectly, lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)).

10 Section 4(2)(a) of the EIR Act provides that:

4(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:

Subsection (1) is the definition of an electricity lines business.

11 Tower Ltd and each of its three property owning subsidiaries are associates in terms of section 12(1)(a)(ii) of the EIR Act. Accordingly, each conveys, together with its associates, more than 2.5 gigawatt-hours per annum.

12 Tower Ltd and its three property owning subsidiaries are, therefore, electricity lines businesses in terms of the EIR Act.

13 Tower Ltd and its three property owning subsidiaries:

- carry on an electricity lines business (s7(1)(a));
- exceed the 10% threshold in terms of control rights in that business (s7(1)(b)); and

<sup>3</sup> Commission staff have estimated this additional amount conveyed is about [ ] gigawatt-hours per annum.

<sup>4</sup> Commission staff have estimated this amount conveyed is about [ ] gigawatt-hours per annum.

<sup>5</sup> If the Mall is fully tenanted.

- have material influence over that business (s7(1)(c)).

14 Therefore, Tower Ltd and its three property owning subsidiaries are involved in an electricity lines business in terms of the EIR Act.

### **Electricity Supply Business**

15 Tower Ltd, Tower Life New Zealand Ltd and Tower Property Nominees Ltd, in terms of the EIR Act, sell electricity in New Zealand (s5(1)(a)(i)). Tower Corporation Holdings Ltd does not sell electricity. Section 5(2)(a) of the EIR Act provides that:

- 5(2) None of the following activities brings a person within subsection (1):
- (a) Selling or generating less than 2.5 GWh per annum:

Subsection (1) is the definition of an electricity supply business.

16 Tower Ltd and Tower Property Nominees Ltd are not excluded from the definition of electricity supply business by section 5(2)(a). However, Tower Life New Zealand Ltd is excluded from the definition of electricity supply business by section 5(2)(a) because it sells less than 2.5 gigawatt-hours per annum.

17 Therefore, Tower Ltd and Tower Property Nominees Ltd are electricity supply businesses in terms of the EIR Act.

18 Tower Ltd and Tower Property Nominees Ltd:

- carry on an electricity supply business (s7(1)(a));
- exceed the 10% threshold in terms of control rights in that business (s7(1)(b)); and
- have material influence over that business (s7(1)(c)).

19 Therefore, Tower Ltd and Tower Property Nominees Ltd are also involved in an electricity supply business in terms of the EIR Act.

### **PROHIBITED CROSS-INVOLVEMENT**

20 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.”

21 Tower Ltd and Tower Property Nominees Ltd are involved, and wish to remain involved, in both an electricity lines and an electricity supply business. Tower Ltd and Tower Property Nominees Ltd have, in terms of section 17 of the EIR Act, a prohibited cross-involvement.

22 The two companies have, therefore, applied to the Commission for exemption from the application of the EIR Act and, in particular, from the requirement to comply with the ownership separation provisions of the EIR Act.

## COMMISSION PROCEDURES

### General

- 23 For the purpose of considering this application for exemption, 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 E C A Harrison.
- 24 The Commission's decision is based on an investigation conducted by its staff and their subsequent advice to the Commission.
- 25 At an early stage of the investigation it became apparent that Tower Ltd had not provided details of the totality of the electricity lines businesses of its subsidiaries in its application for exemption. The additional information was received by the Commission on 6 December 2000.

### Criteria Used by the Commission to Consider Exemption Applications

- 26 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<sup>6</sup>.
- 27 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.”

- 28 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

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

these limits and requirements is, other than in exceptional circumstances,<sup>(7)</sup> expected.”

29 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)<sup>8</sup> 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.”

## **EXAMINATION IN TERMS OF THE COMMISSION’S CRITERIA**

### **Incentives or Opportunities to Inhibit Competition in the Electricity Industry**

- 30 The Commission’s focus under this heading is on that part of the national electricity retail market comprising the electricity consumers who are tenants of Tower Property Nominees Ltd and ultimately of Tower Ltd at Merivale Mall and whether an exemption would provide Tower Ltd and/or Tower Property Nominees Ltd with incentives or opportunities to inhibit competitive electricity supply to them.
- 31 The Commission considers that Tower Ltd and/or Tower Property Nominees Ltd could, in some circumstances, have the incentives and opportunities to inhibit competitive electricity supply to its tenants at Merivale Mall by using the market power its ownership of electricity lines gives it. Although it does not charge a margin over its own electricity purchase costs at present, it could do so in the future.
- 32 However, the leasing of the Merivale Mall occurs in a competitive property market. The Commission notes that at the time of the Tower Ltd’s application, the Mall was only 87% tenanted. The Commission considers that such competition for tenants mitigates against any incentive or opportunity for Tower Ltd and/or Tower Property Nominees Ltd to attempt to raise electricity prices by anti-competitive behaviour.
- 33 Further, if Tower Property Nominees Ltd attempts to raise the price it charges for electricity to above competitive levels, there is the potential for its tenants at Merivale Mall to obtain electricity from another electricity retailer. The Commission will require as a condition to any exemption it grants that Tower Ltd and Tower Property Nominees

<sup>7</sup> For example, of the types provided for in section 19 of the EIR Act.

<sup>8</sup> Defined using the same process as used for market definitions in respect of Commerce Act matters.

Ltd shall not charge for the use of its electricity lines and shall permit access to those electricity lines by other electricity retailers.

- 34 Therefore, given these two factors, the Commission considers that Tower Ltd and Tower Property Nominees Ltd's incentives and opportunities to inhibit competitive electricity supply to its lessees are no more than minimal and can be suitably dealt with by conditions attached to any exemption granted by the Commission.

### **Incentives or Opportunities to Cross-subsidise Generation Activities**

- 35 Neither Tower Ltd nor Tower Property Nominees Ltd are involved in electricity generation activities. This criterion is not relevant.

### **A Relationship Not at Arms Length**

- 36 Tower Ltd and Tower Property Nominees Ltd propose 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 the Merivale Mall network by electricity retailers who wish to supply electricity consumers in the Mall. The relationship between the electricity lines and supply businesses will not be at arms length.
- 37 However the Commission considers that the potential effects of the relationship, not at arms length, can be tempered by the fact that Tower Property Nominees Ltd supplies line function services, to all the consumers it supplies with electricity, at no charge. Tower Ltd has undertaken that it will not introduce a line charge in the future. It is, in this respect, 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**

- 38 Therefore, provided certain conditions are adhered to, the Commission considers that Tower Ltd's application satisfies the Commission's criteria for the granting of exemptions from the EIR Act.
- 39 The Commission exempts Tower Ltd and Tower Property Nominees Ltd from the application of section 17 of the EIR Act subject to the terms and conditions specified in the Notice of Exemption.
- 40 The Commission also notes that section 81(5) provides that the Commission may vary or revoke any exemption at any time.

## **NOTICE OF EXEMPTION**

The Commission, pursuant to section 81 of the Electricity Industry Reform Act 1998, exempts Tower Ltd and its subsidiary Tower Property Nominees Ltd from the application of section 17 of that Act in relation to prohibited cross-involvements in an electricity lines business and an electricity supply business.

The exemption is subject to the following terms and conditions:

- (a) That Tower Ltd and its subsidiaries shall not introduce a charge to any consumer they supply with electricity, for the use of or related to, any electricity lines business that Tower Ltd or any of its subsidiaries may own or operate.
- (b) That Tower Ltd and its subsidiaries shall not prevent the access to their electricity lines, on reasonable terms and within a reasonable time, that any electricity supply business may require to supply electricity to any consumer connected to such lines.
- (c) That Tower Ltd and its subsidiaries shall not enforce any clause in any lease or other agreement with their tenants which requires a tenant to be supplied with electricity by Tower Ltd or its subsidiaries, so that any tenant shall be free to choose that tenant's electricity supplier.
- (d) That Tower Ltd and its subsidiaries will use their best endeavours to provide such reasonable information that any tenant taking a supply of electricity from Tower Ltd or its subsidiaries may request to enable that tenant to assess competitive options available to it for the supply of electricity.
- (e) That Tower Ltd and its subsidiaries do not generate electricity.

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

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

Dated this 18<sup>th</sup> day of January 2001

The Commission