

## COMMERCE COMMISSION

### Decision No. 514

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

#### **AMP DIVERSIFIED PROPERTY TRUST**

**The Commission:**

Paula Rebstock

**Summary of the Application:**

AMP Diversified Property Trust, entities related to AMP Diversified Property Trust and certain other persons which, in relation to certain property investment and management activities, are, or could in future be, involved in both electricity lines businesses and electricity supply businesses, and which in future could acquire involvements or increase the level of their involvements in electricity businesses, seek an exemption, pursuant to section 81 of the EIR Act, from the application of the EIR Act

**Determination:**

The Commission, pursuant to section 81 of the EIR Act, exempts AMP Diversified Property Trust, entities related to AMP Diversified Property Trust and certain other persons from the application of sections 17, 18 and 30 of the EIR Act in relation to certain current and potential property investment and management activities. The exemption is subject to the terms and conditions stated in this decision.

**Date of Determination:**

2 December 2003

**Date of Exemption:**

The exemption takes effect from the date of the publication of a Notice of Exemption in the *New Zealand Gazette*.

**CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKETS**

## CONTENTS

<b>INTRODUCTION.....</b>	<b>2</b>
<b>COMMISSION PROCEDURES .....</b>	<b>2</b>
GENERAL .....	2
CRITERIA USED BY THE COMMISSION TO CONSIDER EXEMPTION APPLICATIONS .....	2
<b>PARTIES .....</b>	<b>4</b>
THE APPLICANTS .....	4
<i>ADP Trust</i> .....	4
<i>Stockland</i> .....	4
<i>Stockland Trust</i> .....	4
<i>Stockland Corporation</i> .....	5
<i>Stockland TM</i> .....	5
<i>ADP NZ Trust</i> .....	5
<i>Trust CA</i> .....	5
<i>AMP Limited (AMP)</i> .....	5
VENDORS .....	5
<i>AMP New Zealand Property Fund (APF)</i> .....	5
<i>AMP Henderson Global Investors (New Zealand) Limited (APF Manager or AMP Henderson NZ)</i> .....	5
<i>AMP Retail</i> .....	6
<b>THE AMPAM DECISION.....</b>	<b>6</b>
<b>SUPPLY OF ELECTRICITY.....</b>	<b>7</b>
SUPPLY OF ELECTRICITY TO TENANTS OF THE CO-OWNER’S .....	7
SUPPLY OF ELECTRICITY TO COMMON BUILDING SERVICES .....	7
<b>EMBEDDED ELECTRICAL WIRING SYSTEMS.....</b>	<b>8</b>
<b>THE EXEMPTION SOUGHT BY ADP.....</b>	<b>8</b>
<b>INVOLVEMENTS AND PROHIBITED CROSS-INVOLVEMENTS.....</b>	<b>10</b>
ELECTRICITY LINES BUSINESS AND INVOLVEMENTS .....	13
ELECTRICITY SUPPLY BUSINESS AND INVOLVEMENTS.....	15
PROHIBITED CROSS-INVOLVEMENTS .....	18
<b>EXAMINATION IN TERMS OF THE COMMISSION’S CRITERIA .....</b>	<b>19</b>
INCENTIVES OR OPPORTUNITIES TO INHIBIT COMPETITION IN THE ELECTRICITY INDUSTRY .....	19
INCENTIVES OR OPPORTUNITIES TO CROSS-SUBSIDISE GENERATION ACTIVITIES .....	22
A RELATIONSHIP NOT AT ARMS LENGTH .....	22
<b>THE COMMISSION’S DECISION.....</b>	<b>22</b>
<b>NOTICE OF EXEMPTION.....</b>	<b>24</b>
<b>APPENDIX 1.....</b>	<b>27</b>
<b>APPENDIX 2.....</b>	<b>30</b>

## INTRODUCTION

- 1 On 6 March 2003 the Commerce Commission (**Commission**) received an application from AMP Diversified Property Trust (**ADP Trust** or **Applicant**) for an exemption under section 81 of the EIR Act (**the Application**). The Application was made by ADP Trust and the entities referred to in Diagrams A, B and C in Appendix 1 of the Application (collectively referred to as **ADP**), and included as Appendix 1 of this decision.
- 2 The Application was amended in a letter dated 1 September 2003 (**Letter of Amendment**) as a consequence of the takeover (**Takeover**) of the ADP Trust by Stockland (**Stockland**). For the purposes of this report, the collective Stockland entities referred to in Diagrams A and B in Appendix 1 of the Letter of Amendment are included in the definition of ADP, and included as Appendix 2 of this decision.
- 3 The Applicant seeks an exemption from the application of the EIR Act in respect of its current and potential “cross-involvements” (as that term is defined in the EIR Act) arising in relation to certain property investment and management activities.
- 4 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 s 81 of the EIR Act.
- 5 In making its decision the Commission notes that the facts revealed in the Application are particular to ADP’s situation alone. The Commission also notes that section 81(5) of the EIR Act provides that the Commission may vary or revoke any exemption at any time.

## COMMISSION PROCEDURES

### General

- 6 For the purpose of considering this application for exemption, the Commission, in terms of s 58 of the EIR Act which applies s 105 of the Commerce Act 1986 to the EIR Act, has delegated its powers under s 81 of the EIR Act to Paula Rebstock, Commissioner.
- 7 The Commission’s decision 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

- 8 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>1</sup>
- 9 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

---

<sup>1</sup> Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission’s Role and Processes.

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.”

#### 10 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,<sup>(2)</sup> expected.”

#### 11 The Commission stated in Practice Note No.3 that:

“On receipt of an application in the prescribed 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 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:

- “The relevant market(s)<sup>3</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.”

<sup>2</sup> For example, of the types provided for in s 19 of the EIR Act.

<sup>3</sup> Defined using the same process as used for market definitions in respect of Commerce Act matters.

## **PARTIES**

### **The Applicants**

#### *ADP Trust*

- 12 ADP Trust is a property investment trust listed on the Australian Stock Exchange (**ASX**) whose major investments are in the office, retail and industrial property sectors.
- 13 In September 2002, the ADP Trust, through a wholly owned sub-trust, the AMP Diversified Property (NZ) Trust (**ADP NZ Trust**), and its trustee, AMP Henderson Global Investors Limited (**AMP Henderson**) (acting in its capacity as trustee of the ADP NZ Trust and in its capacities as responsible entity and trustee of the ADP Trust), completed the acquisition (**transaction**) of a one half share in the following shopping centres from AMP NZ Property Retail Limited (**AMP Retail**) (a wholly owned subsidiary of Perpetual Trust Limited acting in its capacity as trustee of AMP New Zealand Property Fund (**APF**), the ultimate beneficial owner of the transaction properties at the time of sale):
- LynnMall Centre, Great North Road, New Lynn, Auckland (**LynnMall**);
  - Botany Town Centre, Corner Te Irirangi Drive and Rakau Drive, Pakuranga, Auckland (**Botany**); and
  - Manukau Supa Centa, Cavendish Drive, Manukau, Auckland (**Manukau**).
- (Collectively referred to as the **Properties**).

#### *Stockland*

- 14 Stockland comprises the Stockland Trust (**Stockland Trust**) and the Stockland Corporation Limited (**Stockland Corporation**) and each of their respective controlled entities. Diagrams A and B forming part of Appendix 2 of this decision set out the Stockland Trust structure and the Stockland corporate structure respectively. Stockland has significant property investments in the retail, commercial and industrial sectors and is a property development business.
- 15 Stockland has acquired 100% of the units in the ADP Trust, and Stockland Trust Management Limited (**Stockland TM**) has acquired, pursuant to an asset transfer and facilitation agreement (**ATF Agreement**), the business of AMP Henderson in providing trust and asset management services in relation to the ADP Trust, and subsequently replaced AMP Henderson as the manager (responsible entity) for the ADP Trust. Pursuant to the Takeover, the ADP Trust has become a 100% owned sub-trust of the Stockland Trust.

#### *Stockland Trust*

- 16 The Stockland Trust is a unit trust which is listed on the ASX. Each unit in Stockland Trust is “stapled” to a share in Stockland Corporation and listed on the ASX as a single stapled security (**Stapled Security**).
- 17 As a listed company the holders of the Stapled Securities are a multiplicity of persons. As at 31 July 2003 J.P. Morgan Nominees Australia Limited and Westpac Custodian Nominees Limited both held over 10% of the Stapled Securities.

*Stockland Corporation*

18 The Stockland Corporation is an Australian company and is listed on the ASX.

*Stockland TM*

19 Stockland TM is an Australian company which is a wholly owned subsidiary of Stockland Corporation.

*ADP NZ Trust*

20 ADP NZ Trust is a 100% owned sub-trust of ADP Trust. ADP NZ Trust's trustee was AMP Henderson Global Investors Limited (**ADP NZ**). Stockland TM has replaced ADP NZ as the trustee of the ADP NZ Trust. Stockland TM has the entitlement to delegate another entity as the holder of an asset in the ADP NZ Trust. It has currently delegated Trust Company of Australia Limited (**Trust CA**) to hold the title, (as custodian) on behalf of the ADP NZ Trust, to the one half share in the Properties.

*Trust CA*

21 Trust CA is an Australian company listed on the ASX and is a financial services business.

*AMP Limited (AMP)*

22 AMP is the ultimate controlling entity of the AMP Group. AMP is listed on the Australian and New Zealand stock exchanges and operates a financial services business in Australia, New Zealand and the United Kingdom.

23 Diagram A of Appendix 1 of this decision gives the company structure of the relevant companies forming part of AMP. As a consequence of the deeming provisions of the EIR Act, the Applicant seeks an exemption for the companies listed in Diagram A.

**Vendors**

24 The entities referred to below were, along with certain other entities, exempted from the application of the EIR Act in relation to LynnMall, Botany, and any future property investment and management activities pursuant to the terms of Decision 373, *AMP Asset Management New Zealand Limited*, 29 September 1999 (“**the AMPAM decision**”).

*AMP New Zealand Property Fund (APF)*

25 APF is a property investment trust whose major investments are in commercial properties, mainly in Auckland and Wellington.

26 Prior to the transaction taking place, APF beneficially owned the whole interest in the Properties through AMP Retail. APF retained beneficial ownership of a 50% share in the Properties.

*AMP Henderson Global Investors (New Zealand) Limited (APF Manager or AMP Henderson NZ)*

27 APF Manager is the investment manager of APF. The APF Manager is a wholly owned subsidiary of AMP Limited. APF Manager was previously named AMP Asset Management New Zealand Limited, as it is referred to in the AMPAM decision.

- 28 Subsequent to the AMPAM decision, AMP Henderson NZ was also appointed asset manager to manage and provide certain services on behalf of both AMP Retail and ADP NZ (referred to as **Co-owners**) under an Asset Management Agreement for the Properties, and is referred to as **Asset Manager** in the performance of this function.
- 29 The Asset Manager appointed AMP Shopping Centres Pty Limited (**Property Manager**), a wholly owned subsidiary of AMP Henderson/ADP NZ, as the property manager under the terms of an Asset Management Agreement.
- 30 As a consequence of the Takeover, a joint venture deed (**JV Deed**) had been entered into which provides:
- (a) AMP Henderson NZ, in its capacity as the Asset Manager of the Properties, will delegate to Stockland TM certain asset management services in relation to the Properties; and
  - (b) AMP Shopping Centres Pty Limited, in its capacity as the Property Manager, will continue as Property Manager of the Properties until 1 August 2006. It has not been decided yet which entity will be appointed the Property Manager after this date. Stockland's own property manager is Stockland Property Management Pty Limited (**Stockland Property**). Stockland Property is an Australian company which is a wholly owned subsidiary of Stockland Corporation.

#### *AMP Retail*

- 31 AMP Retail is the trustee of APF. AMP Retail was previously named Botany Downs Investment Limited, as it is referred to in the AMPAM decision.

#### **THE AMPAM DECISION**

- 32 In the AMPAM decision the Commission, pursuant to section 81 of the EIR Act, exempted AMP Limited, certain subsidiaries of AMP Limited and certain other persons from the application of sections 17, 18 and 30 of the EIR Act in relation to certain current and potential property investment and management activities, subject to the terms and conditions stated in that decision. This exemption continues to apply for APF's one half share in the Properties retained by APF under the transaction.
- 33 As noted above, AMP Henderson NZ was exempted under the AMPAM decision for certain activities it carried out prior to the transaction. However, the factual situation regarding AMP Henderson NZ has changed so that in addition to being the investment manager of APF, it is also the Asset Manager of the Properties as a result of the Asset Management Agreement as modified by the JV Deed, and thus comes within the scope of this exemption.
- 34 The following companies were also exempted under the AMPAM decision provided they complied with the terms and conditions stated in that decision:
- AMP Henderson;
  - AMP Shopping Centres Pty Limited;
  - Stockland Property;
  - AMP Henderson Holdings Limited;
  - AMP Holdings Limited;

- AMP Group Holdings Limited;
- AMP Services Holdings Limited;
- AMP Services Limited;
- AMP Group Services Limited; and
- AMP Limited.

35 These companies are included within the scope of this exemption as there is a new cross involvement due to their relationship with ADP, and in the interests of providing these companies with greater certainty regarding their status under the EIR Act.

## **SUPPLY OF ELECTRICITY**

### **Supply of Electricity to Tenants of the Co-Owner's**

- 36 Stockland TM, in its capacity as a Co-Owner, supplies electricity to tenants at LynnMall and Botany but not at Manukau. The electricity supplied to the tenants at LynnMall and Botany exceeds 2.5 GWh per annum in both cases, with [ ] GWh and [ ] GWh per annum supplied to tenants at LynnMall and Botany respectively.
- 37 Schedule 1 in Appendix 2 of the Application details the quantities of electricity consumed at LynnMall and Botany during 2002 by the tenants and in respect of common services (and the total).
- 38 The tenants at Manukau each arrange their own electricity supply directly with an electricity retailer.
- 39 Schedule 2 in Appendix 2 of the Application details the estimated quantity of electricity consumed at Manukau during 2002 in respect of common services.
- 40 The leases in respect of the Properties contain clauses that relate to the supply of electricity (and, in some cases, other utilities). The different types of lease clauses relating to electricity are set out in the Schedules of Lease Clauses forming Appendix 3 of the Application.
- 41 Most of those clauses give the tenant the option whether to be supplied with electricity by the landlord (in particular, the Botany leases). Some clauses provide that the landlord has the option of choosing whether or not it will supply the tenant with electricity. Yet other clauses, usually from older leases, refer to the "proper Authority" as the supplier.
- 42 Whatever the situation in terms of lease clauses, APF Manager's practice at the time it first entered into arrangements to on sell electricity was to give tenants at LynnMall and Botany the choice about buying electricity from the landlord.

### **Supply of Electricity to Common Building Services**

- 43 Stockland TM, or the Asset Manager on behalf of Stockland TM, purchases electricity to run the common services at the Properties such as lighting common areas and running central air conditioning systems. The cost of this electricity, along with general running expenditure (such as cleaning common areas), is recovered by the Asset Manager and/or the Property Manager (Stockland TM) from the tenants as part of the operating expenditure charge.

## EMBEDDED ELECTRICAL WIRING SYSTEMS

- 44 Electricity supplied to the Properties is conveyed by means of the existing embedded electrical wiring systems within the various buildings.

## THE EXEMPTION SOUGHT BY ADP

- 45 The exemption sought by ADP relates to Trust CA's one half share in LynnMall and Botany and the related entities forming ADP. ADP consists of a number of entities who have been assessed by the Applicant as currently having a "cross-involvement" (as that term is defined in the EIR Act), and for which a permanent exemption is sought, pursuant to section 81 of the EIR Act, from the application of section 17 of the EIR Act. These entities are:

- the ADP NZ Trust;
- Trust CA;
- the ADP Trust;
- AMP Henderson;
- Stockland TM;
- AMP Henderson NZ;
- AMP Shopping Centres Pty Limited;
- Stockland Property;
- AMP Henderson Holdings Limited;
- AMP Holdings Limited;
- AMP Group Holdings Limited;
- AMP Services Holdings Limited;
- AMP Services Limited;
- AMP Group Services Limited;
- AMP Limited;
- the Stockland Trust;
- Stockland Corporation;
- J.P. Morgan Nominees Australia Limited; and
- Westpac Custodian Nominees Limited.

- 46 An exemption has not been sought for APF's one half share in the Properties on the basis that the exemption granted in the AMPAM decision will continue to apply to the interests of APF, AMP Retail and the other entities defined as AMP in the AMPAM decision.

- 47 In addition, ADP Trust has not sought an exemption from the application of section 17 of the EIR Act in respect of electricity that is consumed in providing common building services and charged to tenants by way of operating expenses at the Properties. In accordance with Decision 351A, *Trans Tasman Properties Limited*, 6 May 1999 ("**the Trans Tasman Properties decision**"), ADP Trust does not consider that the purchase

and supply of electricity to run common building services (the cost of which is recovered as part of the operating expense charge) constitutes an “electricity supply business” for the purposes of the EIR Act.

- 48 The Applicant notes that in the case of Stockland, as its Stapled Securities are traded on the ASX, such persons (if any) holding over 10% of the Stapled Securities in Stockland will change from time to time. The Applicant considers that it seems outside the contemplation of the EIR Act that an exemption will need to be sought, from time to time, for every person acquiring more than 10% of the securities in a publicly listed entity. It appears to the Applicant that, strictly speaking the exemption applicable to ADP could become invalid because, through circumstances beyond the control of ADP/Stockland, there may be trading in the Stapled Securities after the end of 2003, pursuant to which other persons become “involved” for the purposes of the EIR Act. The Applicant therefore requests the Commission either:
- (a) “Grant a “blanket” exemption to all holders, from time to time, of over 10% of the Stapled Securities (being listed securities); or
  - (b) Determine that, on the basis that an exemption is granted to Stockland (being a publicly listed entity), no exemption is required to be granted to persons, from time to time, holding Stapled Securities.”
- 49 The scope of the exemption sought under section 81 of the EIR Act from the application of section 17 of the EIR Act in respect of the above-mentioned entities has been set out in the Application in two parts:
- Part A: permanent exemption. This refers to the Commission’s substantive decision.
  - Part B: short term exemption. If the application for permanent exemption is declined after 30 September 2003, ADP applies for a three month exemption from the application of section 17 of the EIR Act (from the date of the Commission’s decision to decline Part A of the application) to enable it to comply with the ownership separation rules of the EIR Act. Following the Commission’s determination in the AMPAM decision, ADP does not seek a short term exemption under section 81 of the EIR Act from the application of section 17 of the EIR Act until such a time as the Commission determines the substantive grounds for permanent exemption.
- 50 If the Commission is prepared to grant the application for exemption, ADP accepts that it should be on the same conditions as those contained in Decision No. 373 (**ADP’s conditions**), namely:
- (a) That ADP or any other persons do not introduce a charge to any person for the use of, or in connection with, any electricity lines business in relation to the supply of electricity to tenants of ADP’s properties.
  - (b) That ADP or any other persons do not prevent access to any embedded electrical wiring systems owned or operated in relation to ADP’s property investment activities, by any competing electricity supply business wanting to supply electricity to any of ADP’s tenants.
  - (c) That ADP or any other persons do not at any time enforce any of the existing lease clauses which allow the option of supplying electricity to any of ADP’s tenants, so that ADP’s tenants are free to choose their electricity supplier.

- (d) That ADP or any of the cross-involved entities provide all tenants of ADP's properties 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.
- 51 In addition to the current "cross-involvement" identified in the Application for which ADP seeks an exemption from the application of section 17 of the EIR Act, ADP has recognised that future property investment and management activities it might undertake would be in contravention of the EIR Act. ADP therefore also seeks exemption from the application of the EIR Act in respect of such activities, subject to ADP's conditions.
- 52 The future property investment activities for which AMP seeks exemption have been specified in the Application in two parts. First, ADP states that its property investment business involves the ongoing sale and purchase of property owning companies and/or properties. ADP recognises that each time it acquires a new property owning company and/or property it may increase its involvement in an electricity lines business in terms of the EIR Act and require an exemption from the prohibition on cross-involvement in section 17. ADP notes that section 30 of the EIR Act generally prohibits a person with a cross-involvement from acquiring an involvement or increasing its involvements in an electricity business, which includes an electricity lines and supply business. In addition, ADP notes that, in some circumstances, by acquiring a new property owning company and/or property it may also be in breach of section 18 of the EIR Act (i.e. the 20% aggregate cross-ownership prohibition).
- 53 ADP wishes to avoid having to seek an exemption each time it purchases a new property owning company and/or property because of the compliance costs involved, and potential transactional delays which could result.
- 54 Secondly, ADP also wishes to avoid having to seek an exemption in relation to Manukau in the event that circumstances change so that ADP supplies electricity directly to the Manukau tenants at some future time. Accordingly, ADP seeks an exemption in respect of any business or involvement or interest in relation to any future property investment and management activities that ADP might undertake and also in respect of Manukau in the event that circumstances change in the future so that ADP supplies electricity directly to the Manukau tenants.

## **INVOLVEMENTS AND PROHIBITED CROSS-INVOLVEMENTS**

- 55 Section 17 of the EIR Act provides:

**"17. Cross-ownership prohibition –**

- (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."

- 56 It is necessary to consider in relation to the Application whether any persons are currently "involved" (as defined in section 7 of the EIR Act) in an "electricity lines business" and "electricity supply business" (as those terms are defined in sections 4 and 5 of the EIR Act respectively).
- 57 The definition of "electricity lines business" appears in section 4(1) of the EIR Act. That provides as follows:

**“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.”

58 There then follows in subsection (2) a number of exemptions:

- “(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:
  - (b) Conveying electricity solely for its own consumption or for the consumption of its associates:
  - (c) Conveying electricity only from a generator to the national grid or from the national grid to a generator:
  - (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:
  - (e) Conveying electricity by lines that are owned or operated by a business that also owns or operates a generator which generates electricity solely for the consumption of a local community, where both those lines and that generator are not connected, directly or indirectly, to the national grid:
  - (f) Conveying electricity only by a line or lines that are mostly in competition with a line or lines operated by another electricity lines business that is not an associate of the person, provided that the competition is actual competition and not potential competition:
  - (g) Owning or operating, directly or indirectly, lines referred to in any of paragraphs (a) to (f) or any other core assets of an electricity lines business used in connection with those lines.”

59 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:
    - (i) Generates electricity in New Zealand:
    - (ii) 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.”

60 Subsection (2) 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 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) generating electricity from distributed generation, and selling the electricity generated, where -
  - (i) the generating capacity of the distributed generation is no more, at any one time, than the greater of 5MW (determined according to the nameplate or nameplates) and 2% of the maximum demand, in the immediately preceding financial year, of the system to which the distributed generation is connected; and
  - (ii) the distributed generation is owned or operated by a business that also conveys electricity by line and that distributed generation is connected to those lines:
- (f) selling financial transmission rights that hedge risks arising from the effects of losses and constraints on the national grid
- (g) owning or operating, directly or indirectly, a generator referred to in any of the paragraphs (b) to (f) or subsection (3) or any other core generation assets used in connection with those generators.

61 Section 7(1) of the EIR Act contains the definition of “involved” which provides:

**“7. Meaning of ‘involved’**

- (1) For the purposes of this Act, a person is involved in an electricity business if the person -
  - (a) Carries on that business, either alone or together with its associates and either on its own or another’s behalf; or
  - (b) Exceeds the 10% threshold in section 8 in respect of that business; or
  - (c) Has material influence over the business; -
 and ‘involvement’ has a corresponding meaning.”

62 Section 11 of the EIR Act contains the definition of “material influence” which provides:

- (1) Without limiting the ordinary meaning of the expression “material influence”, the following people are deemed to have material influence over an electricity business:
  - (a) A manager of a person that carries on the business;
  - (b) If the business is carried on by a natural person, that person;
  - (c) A person in accordance with whose directions, instructions, or wishes a person referred to in either of paragraph (a) or paragraph (b), or the business, may be required or is accustomed to act in respect of the carrying on or management of the business;
  - (d) A person that exercises or that is entitled to exercise, or who controls or is entitled to control the exercise of, powers which would ordinarily fall to be exercised by a person referred to in either of paragraph (a) or paragraph (b);
  - (e) A person that can appoint or remove, or control the appointment or removal of, a person referred to in either of paragraph (a) or paragraph (b);
  - (f) A person that has a power to influence a decision of the business which would ordinarily require the holding of control rights which would cause the person to exceed the 10% threshold;

- (g) A person in circumstances where that person and the business is acting, or proposing to act, jointly or in concert in relation to the business; or
  - (h) A person that, under a trust or agreement (whether or not the person is a party to it), may at any time have any of the powers referred to in paragraph (c) to paragraph (f).
- (2) Where a person has material influence over an electricity business under this section, and another person has any of the powers or controls referred to in paragraph (c) to paragraph (h) in relation to the first person or the majority of its managers, then that other person is deemed also to have material influence over the business, and so on.
- (3) A person is deemed to have material influence over an electricity business if the person is one of 2 or more associates who, together, have material influence over the business.
- (4) Subsection (3) does not apply to deem a person to have material influence over a business only because that person is, under section 12(1)(b) or (c), an associate of another person, provided those associates act in accordance with the arms length rules (with all necessary modifications) in respect of the business.
- (5) For the avoidance of doubt, a power to cast one of many votes at an election of trustees or councillors does not, of itself, constitute material influence.

63 Section 81(1) of the EIR Act provides the Commission with powers of exemption:

- (1) The Commission may, for the purposes of this Act, in its discretion and upon the terms and conditions (if any) that it thinks fit, by notice in the *Gazette*, exempt—
  - (a) any business, involvement, or interest, or class of business, involvement, or interest, from the application of this Act; or
  - (b) any person or class of persons from compliance with any provisions of this Act or any regulations made under it.

### **Electricity Lines Business and Involvements**

- 64 The Commission considered the application of the EIR Act in relation to investment properties in the Trans Tasman Properties decision and the AMPAM decision. As a result of those decisions, in respect of section 4(1) of the EIR Act, a business that conveys electricity by an embedded electrical wiring system within a building in New Zealand is considered by the Commission to be an “electricity lines business” (unless it is an activity exempted from the meaning of “electricity lines business” by section 4(2)). Under section 4(1)(b) an electricity lines business includes the ownership or operation, directly or indirectly, of an embedded electrical wiring system conveying electricity.
- 65 Accordingly, the Commission concludes in respect of the Application that the following entities, for which exemption from the application of the EIR Act is sought by ADP, are electricity lines businesses under section 4 of the EIR Act:

- The ADP NZ Trust (and Trust CA, in its capacity as custodian of the assets of the ADP NZ Trust) because the ADP NZ Trust:
  - owns, directly, lines that convey electricity in New Zealand, being the embedded electrical wiring systems in LynnMall and Botany (section 4(1)(a) and(b)); and
  - is not exempt from the meaning of "electricity lines business" through section 4(2).
- The ADP Trust because it:
  - owns, indirectly through the ADP NZ Trust, lines that convey electricity in New Zealand (section 4(1)(a) and (b)); and

- is not exempted from the meaning of "electricity lines business" through section 4(2).
- The Stockland Trust because it:
  - owns, indirectly through the ADP NZ Trust, lines that convey electricity in New Zealand (section 4(1)(a) and (b)); and
  - is not exempted from the meaning of "electricity lines business" through section 4(2).
- AMP Henderson NZ (in its capacity as the Asset Manager) because, as the manager and agent of the ADP NZ Trust, it:
  - operates lines that convey electricity in New Zealand, being the embedded electrical wiring systems within the buildings owned by the ADP NZ Trust (section 4(1)(a) and (b)); and
  - is not exempted from the meaning of "electricity lines business" through section 4(2).

66 The Commission also concludes that the above electricity lines businesses identified in paragraph 65 above are involved for the purposes of section 7 of the EIR Act because they:

- carry on their electricity lines businesses, either alone or together with their associates and either on their own or another's behalf (section 7(1)(a));
- exceed the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in their electricity lines businesses (in the case of the ADP NZ Trust, Trust CA (in its capacity as custodian of the assets of the ADP NZ Trust), the ADP Trust and the Stockland Trust only) (section 7(1)(b));
- have material influence over their electricity lines businesses (in the case of the ADP NZ Trust, Trust CA (in its capacity as custodian of the assets of the ADP NZ Trust) the ADP Trust and the Stockland Trust only) (section 7(1)(c)).

67 The Commission concludes that the following entities are also involved in the above electricity lines businesses:

- AMP Shopping Centres Pty Limited (in its capacity as the Property Manager) because, as it assists the Asset Manager with the management of the Properties, it carries on an electricity lines business as an associate of the Asset Manager (section 7(1)(a));
- Stockland Property because, as it may in the future assist the Asset Manager with the property management of the Properties, it would carry on an electricity lines business as an associate of the Asset Manager (section 7(1)(a));
- Stockland TM because, as the ADP Trust's responsible entity, as the ADP NZ Trust's trustee, and as a delegate of the Asset Manager, it is an associate carrying on the ADP NZ Trust's electricity lines businesses with them (section 7(1)(a)), and, under section 11(1)(a) and (f), it also has a material influence over the ADP Trust and the ADP NZ Trust (section 7(1)(c));
- AMP Henderson because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section

11(2), has material influence over AMP Shopping Centres Pty Limited (section 7(1)(c));

- AMP Henderson Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Henderson NZ and AMP Henderson (section 7(1)(c));
- AMP Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Henderson Holdings Limited (section 7(1)(c));
- AMP Group Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Holdings Limited and AMP Group Services Limited (section 7(1)(c));
- AMP Services Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Holdings Limited (section 7(1)(c));
- AMP Services Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Services Holdings Limited (section 7(1)(c));
- AMP Group Services Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Services Limited (section 7(1)(c));
- AMP Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Group Holdings Limited (section 7(1)(c));
- Stockland Corporation because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has material influence over Stockland TM and Stockland Property (section 7(1)(c));
- J.P. Morgan Nominees Australia Limited and Westpac Custodian Nominees Limited respectively because as they are both holders of more than 10% of the issued Stapled Securities in Stockland, they both exceed the 10% threshold in section 8 of the EIR Act (section 7(1)(b)).

### **Electricity Supply Business and Involvements**

68 The Commission concludes in respect of the Application that the following entities, for which an exemption from the application of the EIR Act is sought by ADP, are electricity supply businesses under section 5 of the EIR Act:

- the ADP NZ Trust and Trust CA, in its capacity as custodian of the assets of the ADP NZ Trust because, through the actions of the Asset Manager, they:

- sell electricity in New Zealand (section 5(1)(a)(i));
- own, directly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)); and
- own, directly, the benefit of a contract to sell electricity (section 5(1)(c)(ii)); and
- are not exempted from the meaning of "electricity supply business" through section 5(2);
- The ADP Trust because it:
  - owns, indirectly through the ADP NZ Trust, the core assets of an electricity retail business (section 5(1)(c)(i) and (ii)); and
  - is not exempted from the meaning of "electricity supply business" through section 5(2);
- The Stockland Trust because it:
  - owns, indirectly through the ADP NZ Trust, the core assets of an electricity retail business (section 5(1)(c)(i) and (ii)); and
  - is not exempted from the meaning of “electricity supply business” through section 5(2);
- AMP Henderson NZ (in its capacity as the Asset Manager) because, as the manager and agent of the ADP NZ Trust, it directly operates the core assets of an electricity retail business being the customer data bases relating to and used for the purposes of electricity retail businesses (section 5(1)(c)(i)) and the benefits of contracts to sell electricity (section 5(1)(c)(ii)).

69 The electricity supply businesses identified in paragraph 68 above are involved for the purposes of section 7 of the EIR Act because they:

- carry on their electricity supply businesses, either alone or together with their associates and either on their own or another's behalf (section 7(1)(a));
- exceed the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in their electricity supply businesses (in the case of the ADP Trust, Trust CA (in its capacity as custodian of the assets of the ADP NZ Trust), the ADP Trust and the Stockland Trust only) (section 7(1)(b)); and
- have material influence over their electricity supply businesses (in the case of the ADP Trust, Trust CA (in its capacity as custodian of the assets of the ADP NZ Trust), the ADP Trust and the Stockland Trust only) (section 7(1)(c)).

70 The following entities are also involved in the above electricity supply businesses:

- AMP Shopping Centres Pty Limited (in its capacity as the Property Manager) because, as it assists the Asset Manager with the management of the Properties by, amongst other things, administering the electricity supply, it carries on an electricity supply business as an associate of the Asset Manager (section 7(1)(a));
- Stockland Property because, as it may in the future assist the Asset Manager with the property management of the Properties by, amongst other things, administering the electricity supply, it would carry on an electricity supply business as an associate of the Asset Manager (section 7(1)(a));

- Stockland TM because, as the ADP Trust's responsible entity, as the ADP Trust's trustee, and as a delegate of the Asset Manager, it is an associate carrying on the ADP NZ Trust's electricity lines businesses with them (section 7(1)(a)), and, under section 11(1)(a) and (f), it also has a material influence over the ADP Trust and the ADP NZ Trust (section 7(1)(c));
- AMP Henderson because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has material influence over AMP Shopping Centres Pty Limited (section 7(1)(c));
- AMP Henderson Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Henderson NZ and AMP Henderson (section 7(1)(c));
- AMP Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Henderson Holdings Limited (section 7(1)(c));
- AMP Group Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Holdings Limited and AMP Group Services Limited (section 7(1)(c));
- AMP Services Holdings Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Holdings Limited (section 7(1)(c));
- AMP Services Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Services Holdings Limited (section 7(1)(c));
- AMP Group Services Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Services Limited (section 7(1)(c));
- AMP Limited because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has a material influence over AMP Group Holdings Limited (section 7(1)(c));
- Stockland Corporation because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)), and, under section 11(2), has material influence over Stockland TM and Stockland Property (section 7(1)(c)); and
- J.P. Morgan Nominees Australia Limited and Westpac Custodian Nominees Limited respectively because they are both holders of more than 10% of the issued Stapled Securities in Stockland, they both exceed the 10% threshold in section 8 of the EIR Act (section 7(1)(b)).

- 71 The supply of electricity for the purpose of providing common building services does not constitute, in the Commission’s view, an electricity supply business for the purposes of the EIR Act. In this respect, the Commission stated in the Trans Tasman Properties Decision at paragraph 11:

“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.”

### **Prohibited Cross-Involvements**

- 72 Accordingly ADP seeks an exemption from the application of section 17 of the EIR Act in respect of the following entities (the cross involved entities) with prohibited cross-involvements in relation to LynnMall and Botany:

- the ADP NZ Trust;
- Trust CA;
- the ADP Trust;
- AMP Henderson;
- Stockland TM;
- AMP Henderson NZ;
- AMP Shopping Centres Pty Limited;
- Stockland Property;
- AMP Henderson Holdings Limited;
- AMP Holdings Limited;
- AMP Group Holdings Limited;
- AMP Services Holdings Limited;
- AMP Services Limited;
- AMP Group Services Limited;
- AMP Limited;
- the Stockland Trust;
- Stockland Corporation;
- J.P. Morgan Nominees Australia Limited; and
- Westpac Custodian Nominees Limited.

- 73 In terms of the Commission’s criteria set down in Practice Note No. 3, the national electricity retail market is relevant to the facts stated in the Application as ADP’s activities only relate to the retail of electricity to tenants.

- 74 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 the Application.

## **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?

- 75 The electricity sector reform through the EIR Act has necessitated the separation of electricity distribution functions (lines) and electricity retailing and generation functions (supply) in order to enhance competition and choice in respect of supply. The EIR Act recognises that the market power of an electricity lines business enables the use of various 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 to have access to lines through use-of-system contractual arrangements.
- 76 ADP has argued (as AMP argued in their application preceding and referred to in the AMPAM decision, and which apply to this Application) that granting an exemption from the application of section 17 of the EIR Act in respect of the prohibited cross-involvements identified in the Application would not create an incentive to inhibit competition in the electricity industry. At paragraph 52 of the Application, ADP has stated:
- “(c) Granting an exemption will ... not create any real incentive for ADP to inhibit competition in the electricity retail market. Any perceived incentives are either extremely minimal and/or theoretical. The nature of competition in the commercial properties market is such that ADP is, and will continue to be, motivated to keep tenants’ electricity costs as low as possible. ADP will want to promote competition which generally leads to lower prices. ADP also has a policy of acting fairly and reasonably in relation to its tenants and to inhibit competition is not in accordance with that policy.
- (d) ADP competes with other property owners for tenants. Due to this competition for tenants the total cost that ADP can charge any tenant (i.e. rent plus all other costs) is capped by the market. It is in the interests of ADP as property owners and managers to ensure that rent makes up as much of the total cost for any tenant as is possible because the amount of rent received from tenants directly affects the value that the market gives to a building. Therefore, ADP is strongly motivated to ensure that all other costs that are included in the total costs to the tenant, including electricity costs and ADP’s margins on electricity, are reduced to the lowest possible level.”
- 77 As in the AMPAM decision, it is the Commission’s view that the cross-involved entities do have incentives and opportunities to inhibit competition in the supply of electricity to tenants. Competition can be inhibited; for example, by imposing unreasonable line

charges and access terms in respect of the embedded electrical wiring systems within the relevant properties, or cross-subsidising electricity sales from line charges. The incentives relate to the ability to supply electricity to tenants without facing competition from electricity retailers.

- 78 ADP accepts that a decision by the Commission to grant an exemption for the cross-involved entities should include ADP's conditions, which are consistent with the Commission's terms and conditions in the AMPAM and Trans Tasman Properties decisions, and other similar decisions under section 81 of the EIR Act. ADP's conditions, listed below, will minimise the opportunity for ADP to inhibit competition in the national electricity retail market:
- ADP will continue with its current practice not to charge tenants (or anyone else) for its lines;
  - ADP will not prevent access to its lines by any competing electricity suppliers;
  - ADP will not enforce any of its existing lease clauses which allow the Lessors the option of supplying electricity to the tenants, so that tenants are free to choose their electricity supplier (the Commission notes that ADP has stated that it intends to introduce a new standard lease clause, which will be used in future leases, and will provide tenants with the right to choose their electricity supplier); and
  - ADP will continue to provide consumption and billing information to the tenants in the form of the invoice attached to the Application, or any other information the Commission specifies, to the tenants.
- 79 By including ADP's conditions as part of an exemption from the Commission, ADP concludes in paragraph 52 of the Application:
- “... that there is no opportunity for ADP to inhibit competition in the relevant electricity retail market. As tenants will be free to choose their supplier, competition is promoted between electricity suppliers, for the right to supply the tenants.” (footnote omitted)
- 80 The Commission concurs with ADP. Any opportunities to defeat the purposes of the EIR Act by allowing the cross-involved entities to remain cross-involved would be significantly restricted if ADP's conditions were adopted. However, the Commission also considers that it is necessary that ADP:
- notifies, within a reasonable timeframe, those tenants who have lease clauses which allow ADP the option of supplying electricity to any of ADP's tenants that ADP will not enforce these clauses; and
  - ADP notifies any new tenants who have lease clauses which allow ADP the option of supplying electricity that ADP will not enforce these clauses or alternatively that ADP provides in the lease that tenants can choose their own electricity supplier.
- 81 Accordingly, the Commission considers that, given ADP's conditions, and the additional condition mentioned in paragraph 80, the granting of an exemption from the application of section 17 of the EIR Act in respect of the cross-involved entities would not provide ADP with opportunities to inhibit competition in the national electricity retail market.
- 82 In addition to the current cross-involvements through the cross-involved entities, ADP also seeks an exemption from the application of the EIR Act for future property investment and management activities it might undertake. These future activities have been described in the Application as involving:

- the continuing purchase by ADP of property owning companies and/or properties; and
  - Manukau, in the event that circumstances change in the future so that ADP supplies electricity directly to the Manukau tenants.
- 83 In respect of any future property investments, ADP could be at risk under the following sections of the EIR Act:
- section 30, which is a general prohibition against any person with a cross-involvement acquiring an involvement or increasing the level of any of that person's involvements, except in accordance with sections 31 to 35 of the EIR Act;
  - section 18, which prevents more than 20% in aggregate of the control rights or equity return rights in, or material influence over, an electricity lines business or electricity supply business being held by persons who are involved in the other type of business; and
  - section 17, because if a newly acquired property owning company falls within the definition of an 'electricity supply business' and does not fall within an exemption under s5(2) (e.g. because it sells more than 2.5 GWh of electricity per annum), ADP will breach the prohibitions on cross-involvements.
- 84 ADP states that by obtaining an exemption now for its future property investment activities, it will avoid having to seek an exemption each time it undertakes a new investment activity which is affected by the EIR Act, thus saving itself compliance costs and potential transactional delays.
- 85 If the Commission decides to grant ADP an exemption in respect of potential future property investment and management activities undertaken by it, ADP accepts that the exemption should be on the same conditions as those imposed on ADP (as proposed by ADP for the cross-involved entities) in respect of those activities.
- 86 The Commission considers that granting an exemption in this decision from the application of sections 17, 18 and 30 of the EIR Act in respect of any future property investment and management activities that ADP might undertake (including the possible supply of electricity to tenants at Manukau) will not provide ADP with opportunities to inhibit competition in the national electricity retail market, so long as ADP's conditions are adopted and the Commission is informed of the details of any future property investment activities that are likely to breach the EIR Act and for which ADP is relying on the exemption from the Commission.
- 87 ADP also seeks an exemption for any person who, from time to time, acquires more than 10% of the securities in Stockland, either in the form of a "blanket exemption" or as an extension of the exemption which it requests for Stockland.
- 88 The Commission considers that any opportunities for parties who, from time to time, acquire more than 10% of the securities in Stockland to defeat the purposes of the EIR Act would be significantly restricted if ADP's conditions were adopted. Accordingly, the Commission considers that, given ADP's conditions, the granting of an exemption from the application of section 17 of the EIR Act in respect of parties who may in the future acquire more than 10% of the securities in Stockland would not provide ADP with opportunities to inhibit competition in the national electricity retail market.

- 89 The Commission considers that the best means with which to accomplish this is by granting a blanket exemption for parties who, from time to time, acquire more than 10% of the securities in Stockland, in accordance with the Applicant's request in the Letter of Amendment.

### **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?

- 90 None of the cross-involved entities or ADP's property investment activities are involved in electricity generation. Accordingly, this criterion is not relevant to the Commission's analysis in this decision.

### **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?

- 91 By granting an exemption from the application of section 17 of the EIR Act to the cross-involved entities and in respect of potential cross-involvements which might arise as a result of ADP's future property investment and management activities, the Commission would be allowing relationships between electricity lines businesses and electricity supply businesses to not be at arms length.
- 92 However, the Commission considers that the potential effects of the relationships not being at arms length would be tempered by the fact that any exemption from the EIR Act would be subject to ADP's conditions being implemented and, in the case of any future property investment and management activities undertaken by ADP, the Commission being kept informed by ADP of any comparable activities for which ADP is relying on the exemption from the Commission. As a result, the Commission does not consider the potential effects of the relationships not being at arms length to be a material risk to the purposes of the EIR Act.

### **THE COMMISSION'S DECISION**

- 93 The Application passes two of the three criteria used by the Commission to decide upon exemptions from the EIR Act, assuming certain conditions are met. The third criterion is not applicable.
- 94 Accordingly, the Commission, under section 81 of the EIR Act, exempts:
- the cross-involved entities from the application of section 17 of the EIR Act, namely:
    - the ADP NZ Trust;
    - Trust CA;
    - the ADP Trust;

- AMP Henderson;
  - Stockland TM;
  - AMP Henderson NZ;
  - AMP Shopping Centres Pty Limited;
  - Stockland Property;
  - AMP Henderson Holdings Limited;
  - AMP Holdings Limited;
  - AMP Group Holdings Limited;
  - AMP Services Holdings Limited;
  - AMP Services Limited;
  - AMP Group Services Limited;
  - AMP Limited;
  - the Stockland Trust;
  - Stockland Corporation;
  - J.P. Morgan Nominees Australia Limited; and
  - Westpac Custodian Nominees Limited.
- any business or involvement or interest in relation only to any future property investment and management activities that AMP Diversified Property Trust, the entities referred to in Diagrams A, B and C in Appendix 1 of this decision, and the entities referred to in Diagrams A and B in Appendix 2 of this decision might undertake from the application of sections 17, 18 and 30 of the EIR Act, and in respect of which sections 17, 18 and/or 30 would apply; and
  - persons who, from time to time, acquire more than 10% of the securities in Stockland from the application of section 17 of the EIR Act.
- 95 The exemption is applicable to the specific businesses, involvements or interests listed, and is subject to the terms and conditions specified by the Commission, in the Notice of Exemption.
- 96 In making its decision the Commission notes that the facts revealed in the Application are particular to ADP's situation alone. The Commission also notes that section 81(5) of the EIR Act provides that the Commission may vary or revoke any exemption at any time.

## NOTICE OF EXEMPTION

The Notice of Exemption concerns an application received by the Commerce Commission (Commission) on 6 March 2003 made by AMP Diversified Property Trust (ADP Trust), and amended on 1 September 2003, on behalf of ADP (the Application). ADP includes those companies shown in the Commission Decision 514 in Appendices 1 and 2.

ADP seeks in the Application, under section 81 of the Electricity Industry Reform Act 1998 (EIR Act), an exemption from the EIR Act.

The Commission, pursuant to section 81 of the EIR Act, exempts the following entities (cross-involved entities) from the application of section 17 of the EIR Act in respect of their current “cross-involvement” (as that term is defined in the EIR Act):

- AMP Limited;
- AMP Group Holdings Limited;
- AMP Group Services Limited;
- AMP Services Limited;
- AMP Services Holdings Limited;
- AMP Holdings Limited;
- AMP Henderson Holdings Limited;
- AMP Henderson Global Investors (New Zealand) Limited;
- AMP Henderson Global Investors Limited;
- AMP Shopping Centres Pty Limited;
- The AMP Diversified Property Trust;
- The AMP Diversified Property (NZ) Trust;
- Trust Company of Australia Limited;
- Stockland Trust Management Limited;
- Stockland Property Management Pty Limited;
- Stockland Trust;
- Stockland Corporation Limited;
- J.P. Morgan Nominees Australia Limited; and
- Westpac Custodian Nominees Limited.

The Commission, pursuant to section 81 of the EIR Act, also exempts persons who, from time to time, acquire more than 10% of the securities in Stockland from the application of section 17 of the EIR Act in respect of their “cross-involvement” (as that term is defined in the EIR Act).

The above exemption is given to the cross-involved entities and persons who acquire more than 10% of the securities in Stockland subject to the following terms and conditions:

- (a) That ADP or any other persons do not introduce a charge to any person for the use of, or in connection with, any electricity lines business in relation to the supply of electricity to tenants of ADP's properties.
- (b) That ADP or any other persons do not prevent access to any embedded electrical wiring systems owned or operated in relation to ADP's property investment activities, by any competing electricity supply business wanting to supply electricity to any of ADP's tenants.
- (c) That ADP or any other persons do not at any time enforce any of the existing lease clauses which allow the option of supplying electricity to any of ADP's tenants, so that ADP's tenants are free to choose their electricity supplier.
- (d) That ADP:
  - notifies, within three months, those tenants who have lease clauses which allow ADP the option of supplying electricity to them that ADP will not enforce these clauses; and
  - notifies any new tenants, after the date of this exemption, who have lease clauses which allow ADP the option of supplying electricity that ADP will not enforce these clauses or alternatively that ADP provides in the lease that tenants can choose their own electricity supplier.
- (e) That ADP or any of the cross-involved entities provide all tenants of ADP's properties 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.

In addition, the Commission, pursuant to section 81 of the EIR Act, exempts from the application of sections 17, 18 and 30 of the EIR Act any business or involvement or interest in relation only to any future property investment and management activities that ADP might undertake, and in respect of which sections 17, 18 and/or 30 would apply.

The exemption to any business or involvement or interest in respect of any future property investment and management activities that ADP might undertake is given subject to the following terms and conditions being fully observed by the business or involvement or interest to which the exemption applies:

- (a) The terms and conditions as set out above in relation to the exemption given to the cross-involved entities.
- (b) That ADP informs the Commission of the details of any future property investment and/or management activity, within 20 working days (as that term is defined in the Commerce Act 1986) from the day following the day it undertakes the activity, that is likely to breach the EIR Act and for which ADP and/or any other persons are likely to rely on this exemption.

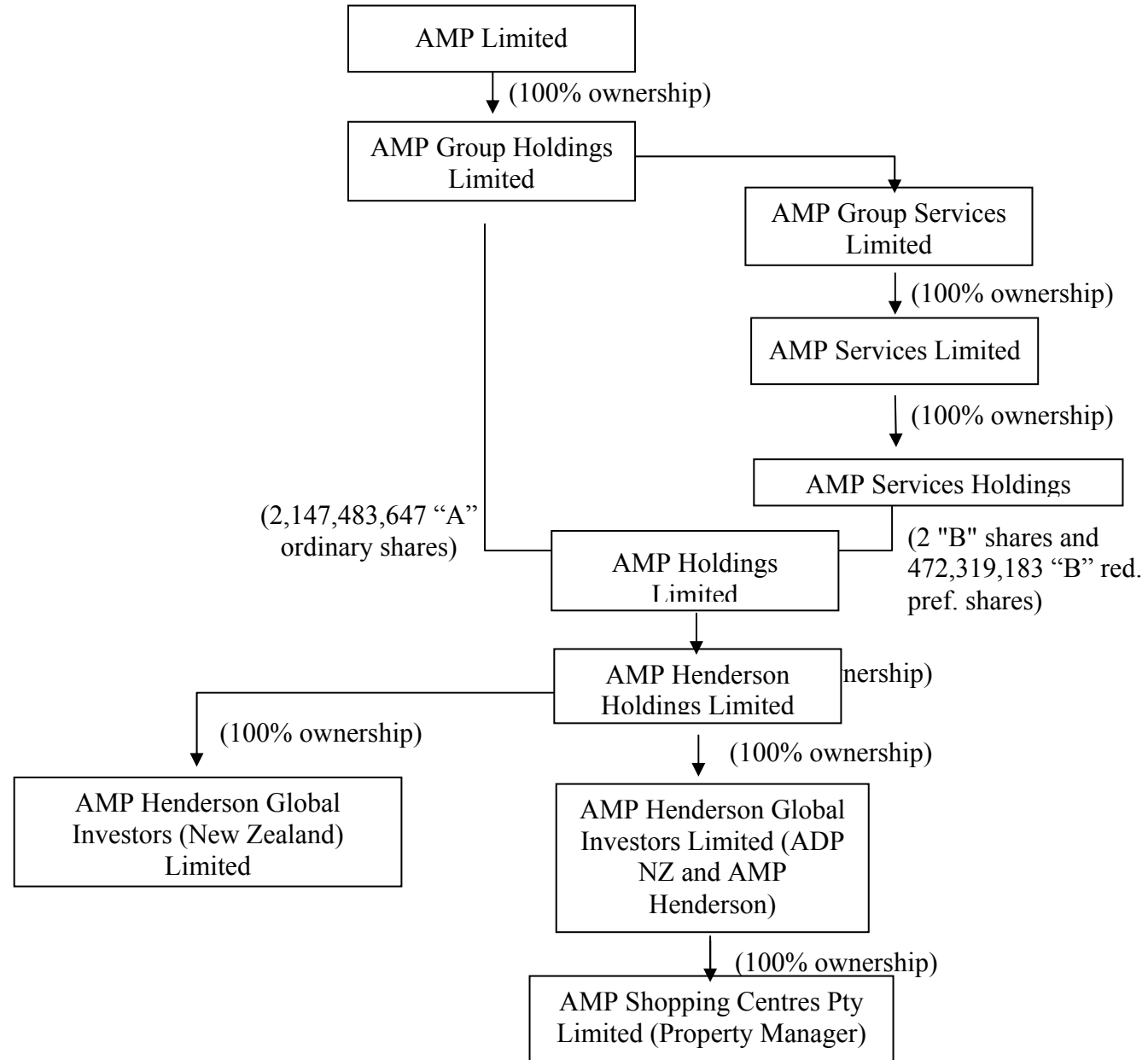
The exemption takes effect from the date of publication of this notice in the *New Zealand Gazette*.

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

Dated this 2<sup>nd</sup> day of December 2003

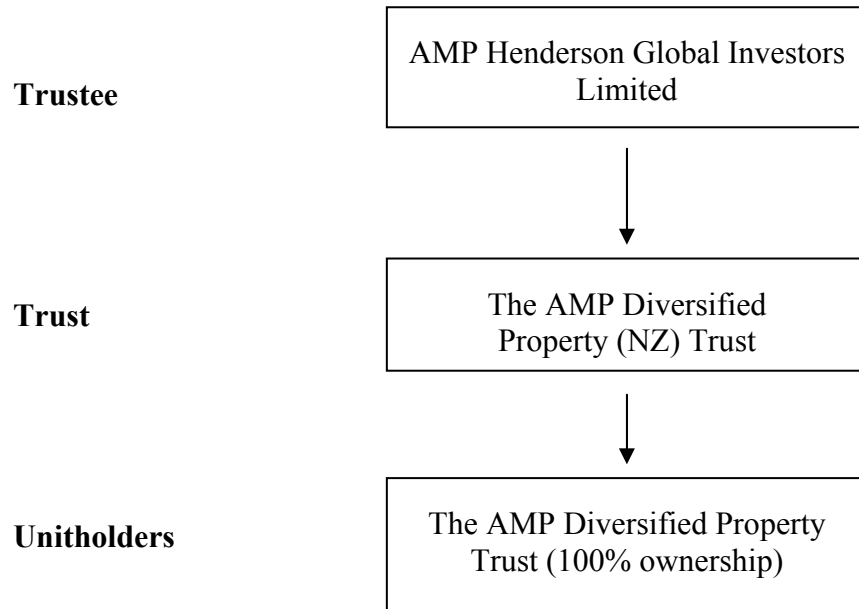
Paula Rebstock  
Acting Chair

**APPENDIX 1**  
**DIAGRAM A :The relevant AMP Group companies**



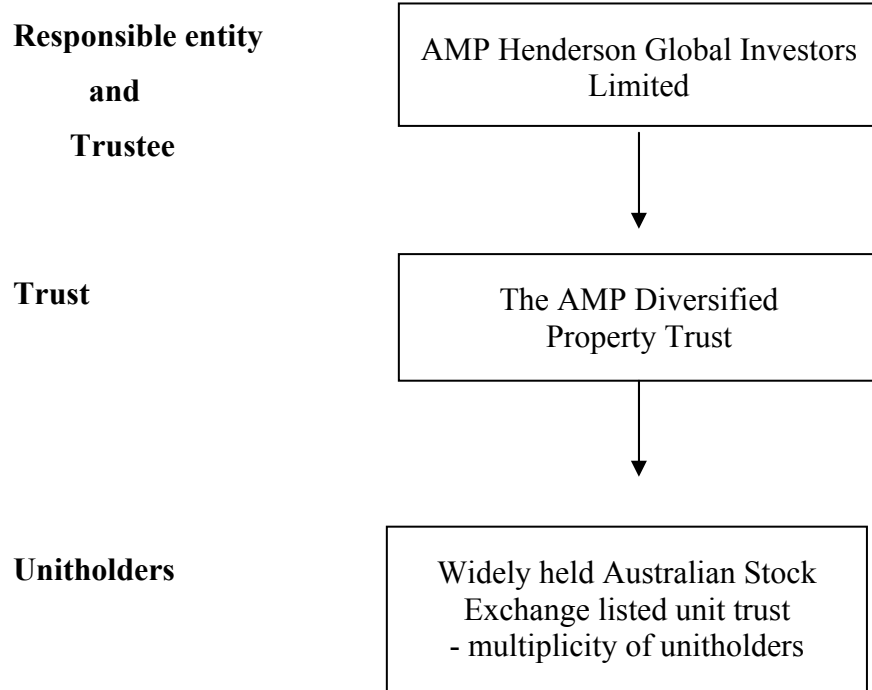
**DIAGRAM B**

**The ADP NZ Trust**



29  
**DIAGRAM C**

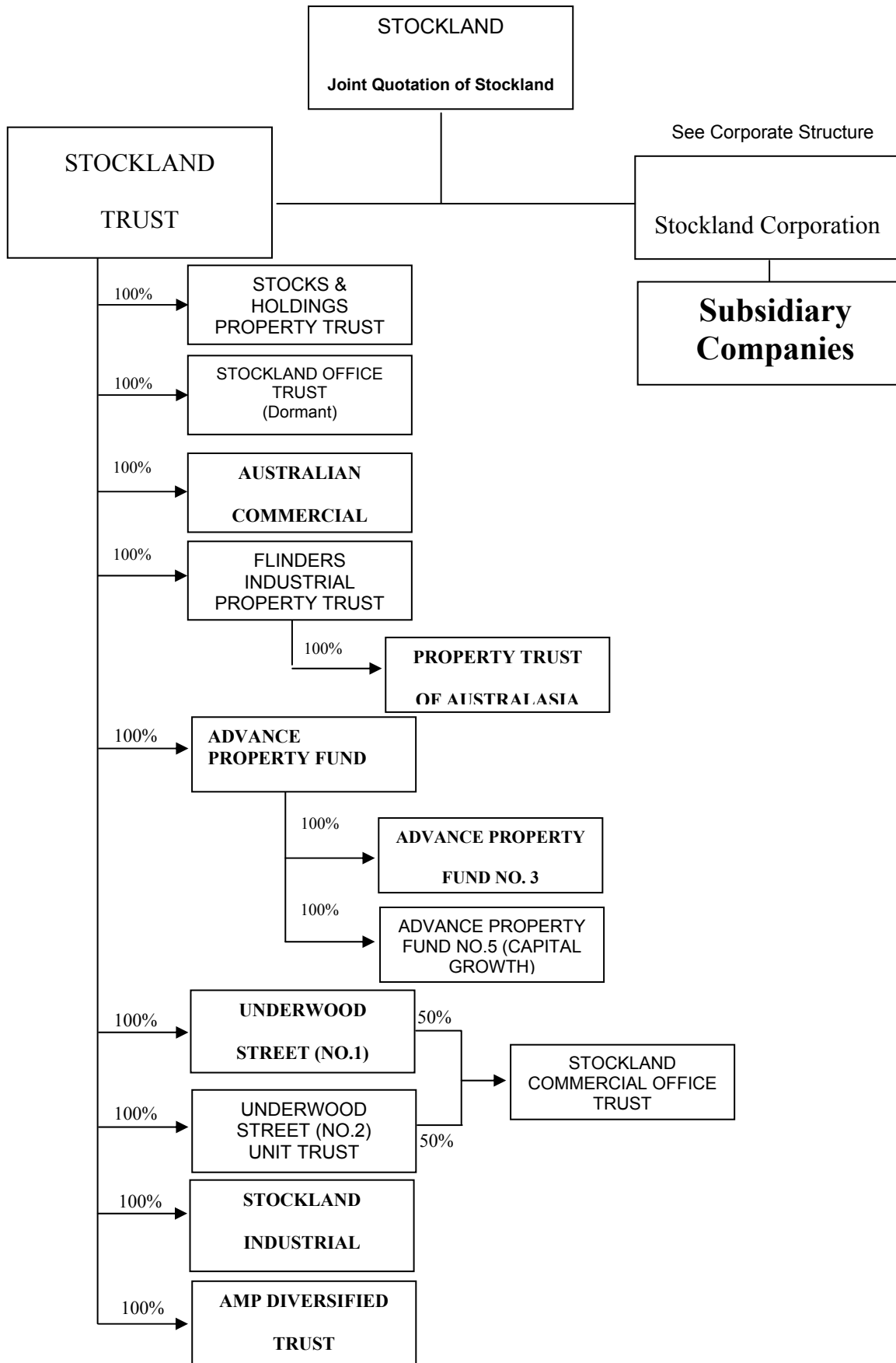
**The ADP Trust**



**APPENDIX 2**

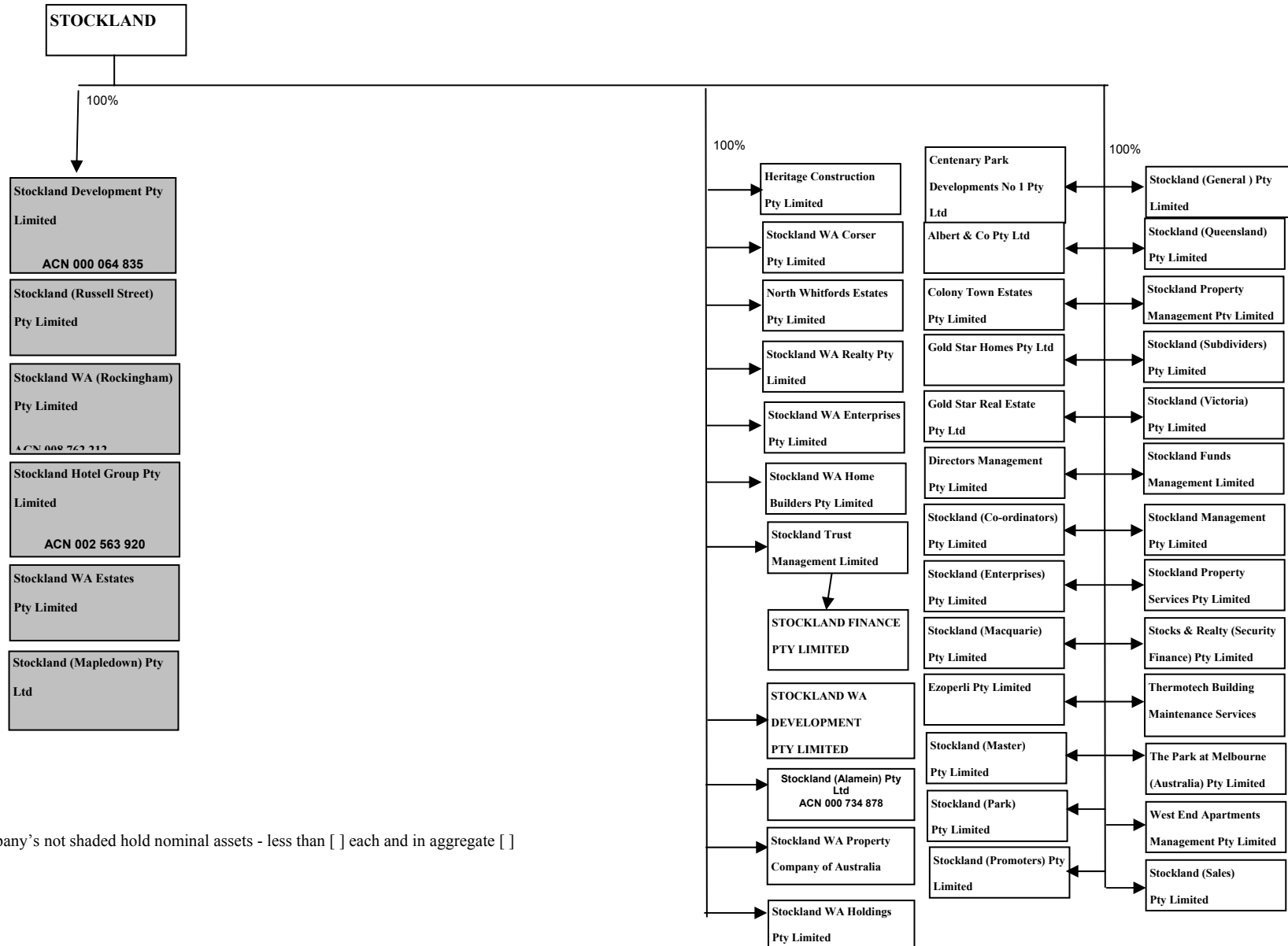
**Diagram A**

**Stockland Trust Structure**



## Diagram B

### Stockland Corporation Limited



**Note:** Company's not shaded hold nominal assets - less than [ ] each and in aggregate [ ]