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## COMMERCE COMMISSION

### Decision No. 547

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

**Mr Wayne Boyd**

**The Commission:**

Paula Rebstock  
Peter JM Taylor

**Summary of the Application**

Mr Wayne Boyd is the Chairman of the Board of Directors of Auckland International Airport Ltd (AIAL), an electricity lines business, and he proposes to join the Board of Directors of Meridian Energy Ltd (Meridian), an electricity supply business. He seeks exemption from the application of section 17 of the EIR Act, in order to become involved in both kinds of business.

**Determination:**

The Commission, in terms of section 81 of the EIR Act, exempts Mr Boyd from the application of section 17 of the EIR Act in relation to a prohibited cross-involvement in an electricity lines business and an electricity supply business. The exemption is subject to the conditions stated in this Decision.

**Date of Determination:**

31 March 2005

**Date of Exemption:**

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

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## INTRODUCTION

- 1 On 14 March 2005, Mr Wayne Boyd applied to the Commerce Commission (the Commission) for exemption from the application of section 17 of the EIR Act. Mr Boyd's involvements in electricity businesses arise from his being Chairman of the AIAL Board of Directors and his potential appointment to Meridian's Board of Directors.
- 2 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.

## DECISIONS 384 AND 517

- 3 In March 2000, the Commission granted Ms Joan Withers an exemption from section 17 of the EIR Act in respect of a cross-involvement through her directorships of the AIAL Board and the Meridian Board. The written reasons for that exemption are contained in the Commission's Decision 384. Miss Withers remains on the boards of Meridian and AIAL.
- 4 In March 2004, the Commission granted Dr Keith Turner an exemption from section 17 of the EIR Act in respect of a cross-involvement through his position as Chief Executive of Meridian and his directorship on the AIAL Board. The written reasons for that exemption are contained in the Commission's Decision 517. Dr Turner remains Chief Executive of Meridian and a Director of AIAL.
- 5 Mr Boyd's Application for Exemption is similar to those of Ms Withers and Dr Turner.

## AIAL AS AN ELECTRICITY LINES BUSINESS

- 6 AIAL is a public company listed on the New Zealand Stock Exchange. It owns and operates the Auckland Airport (the Airport). Its major shareholders are the New Zealand Central Securities Depository Limited, Citicorp Nominees Pty Limited, and the Auckland and Manukau City Councils.
- 7 AIAL owns an electricity distribution network at the Airport. The network operates at 11,000 and 400 volts and comprises transformers, switchgear and underground cables. The network connects to Vector Limited's citywide network at the perimeter of the Airport. AIAL is a lines customer of Vector Limited.
- 8 AIAL distributes electricity to 173 consumers at the airport. AIAL levies a line charge on the consumers for the provision of such line function services<sup>1</sup>.
- 9 In terms of the EIR Act, AIAL:
  - conveys electricity by line in New Zealand (s4(1)(a));
  - owns and operates, directly, lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)); and

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<sup>1</sup> Electricity retailer TrustPower Ltd is the incumbent electricity retailer on AIAL's network.

- does not fall within any of the exclusions listed in section 4(2).

10 Therefore, AIAL is an electricity lines business in terms of the EIR Act.

### **MERIDIAN ENERGY AS AN ELECTRICITY SUPPLY BUSINESS**

11 Meridian is an electricity generator and retailer. It was formed as a result of the division of Electricity Corporation of New Zealand into three separate companies in April 1999 and is a State Owned Enterprise.

12 It owns Manapouri Power Station, eight power stations on the Waitaki River and the Wellington wind powered generator. The total capacity of its power stations is around 2500 megawatts.

13 In addition, Meridian is the incumbent electricity retailer selling electricity over the networks of Northpower Ltd, ScanPower Ltd, Centralines Ltd and Network Waitaki Ltd and also is retailing to electricity customers in other locations throughout New Zealand.

14 In terms of the EIR Act, Meridian:

- sells electricity in New Zealand (s5(1)(a)(i));
- generates electricity in New Zealand (s5(1)(a)(iii));
- owns and operates directly generators in New Zealand (s5(1)(b));
- owns and operates directly core assets of an electricity retail business which include the benefit of contracts to sell electricity (s5(1)(c)); and
- does not fall within any of the exclusions listed in section 5(2) or 5(3).

15 Therefore, Meridian is an electricity supply business in terms of the EIR Act.

### **MR BOYD'S INVOLVEMENT IN AIAL AND POTENTIAL INVOLVEMENT IN MERIDIAN**

16 Mr Boyd is the Chairman of AIAL, which is an electricity lines business, and he also wishes to be a director of an electricity supply business. In terms of the EIR Act:

- AIAL and Meridian are both body corporates and Mr Boyd is a “manager” of both (s3);
- without limiting the ordinary meaning of the expression “material influence”, a manager of a person that carries on an electricity business is deemed to have material influence over the electricity business (section 11(1)(a)); and
- a person is involved in an electricity business if the person has material influence over the business (section 7(1)(c))

- 17 Therefore, on his appointment to the Board of Meridian, Mr Boyd, as a result of his directorships of AIAL and Meridian, would be involved in both an electricity supply and an electricity lines business.

## **PROHIBITED CROSS-INVOLVEMENT**

- 18 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.

- 19 Mr Boyd's appointment to the board of Meridian would mean that he is involved, and wished to remain involved, in both an electricity lines and an electricity supply business. He would have, in terms of section 17 of the EIR Act, a prohibited cross-involvement.

- 20 Mr Boyd has, therefore, applied to the Commission for exemption from the application of section 17 of the EIR Act.

## **COMMISSION PROCEDURES**

### **General**

- 21 For the purpose of considering this application for exemption, the Commission, in terms of 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 PR Rebstock and PJM Taylor.
- 22 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**

- 23 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>2</sup>

- 24 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.

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<sup>2</sup> Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission's Role and Processes.

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.”

25 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>(3)</sup> expected.”

26 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>4</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.”

## **RELEVANT MARKETS**

27 Electricity generation and electricity retail markets in New Zealand, and AIAL’s local electricity distribution market are relevant to the application of the Commission’s criteria to the facts of Mr Boyd’s application for exemption.

## **EXAMINATION OF MR BOYD’S SUBMISSIONS IN SUPPORT OF HIS APPLICATION FOR EXEMPTION**

28 Mr Boyd submitted that his involvements in AIAL and Meridian will not create incentives or opportunities which will inhibit competition in the electricity industry or

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<sup>3</sup> For example, of the types provided for in section 19 of the EIR Act.

<sup>4</sup> Defined using the same process as used for market definitions in respect of Commerce Act matters.

cross-subsidise generation activities from electricity lines businesses, and will not result in relationships between an electricity lines business and an electricity supply business which are not at arms length for the reasons following.

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

- 29 The focus of this enquiry is on the only market which the two companies have in common. That is, on the retail electricity market comprising the 173 consumers connected to AIAL's distribution network at Auckland Airport, and whether an exemption would provide either Meridian or AIAL with incentives or opportunities to inhibit competition in that market.
- 30 Mr Boyd submitted that there is no connection or relationship between the electricity supply business of Meridian and the electricity lines business of AIAL, in which Mr Boyd would be involved. More specifically, Mr Boyd contended, that Meridian is not, nor does it propose to become, an electricity retailer to any tenant or consumer connected to AIAL's electricity network.
- 31 In the event that Meridian did decide to supply electricity to customers on AIAL's electricity network, Mr Boyd submitted that he would be precluded from voting on any such matters by the following mechanisms.
- 32 Mr Boyd argued that as AIAL's equity securities are quoted on New Zealand Exchange Limited (*NZX*), in the event that Meridian proposes to supply AIAL's own electricity requirements or enter into a use-of-systems agreement with AIAL, Mr Boyd would be prohibited under the *NZX* Listing Rules from voting or being included in a quorum for the purposes of considering that matter, as Mr Boyd would be "interested" in that transaction.
- 33 In addition, Mr Boyd contended that Meridian's constitution imposes limits on participation by conflicted directors in board decisions. Mr Boyd submits that Meridian's constitution takes a strict line on conflict matters and provides that a director may not vote on a matter relating to an interested transaction.
- 34 The Commission considers that in the absence of any existing connection or relationship between Meridian and AIAL, other than that due to the presence of Mr Boyd's position as Chairman of the Board of AIAL and his proposed presence on the board of Meridian, presently there is no mechanism whereby Mr Boyd's cross-involvements in themselves would provide incentives or opportunities to inhibit competition in electricity markets.
- 35 However, the Commission considers that should Meridian supply electricity to consumers connected to AIAL's network in the future, there would exist the opportunity for competition to be affected. While the Commission accepts that Mr Boyd could not vote on matters on which he had declared a conflict of interest, it considers that there would be the opportunity for competition to be inhibited by means other than by the formal voting process.
- 36 The Applicant noted that Joan Withers and Dr Keith Turner are already both "involved" in the electricity supply business of Meridian (as a director and chief executive officer,

respectively) and “involved” in the electricity lines business of AIAL (both as directors of AIAL). Mr Boyd also noted that the Commission has previously granted an exemption from the application of section 17 in respect of both those persons.

- 37 In Mr Boyd’s view, his appointment to the board of Meridian would not increase the incentives or opportunities for any of the mischief the EIR Act is trying to prevent. The Applicant noted:

the commercial incentives or opportunities for Meridian to expand into AIAL’s retail market (and particularly to supply AIAL’s current electricity consumers) will not change as a result of Mr Boyd’s appointment to the Meridian board;

the voting restrictions referred to above will apply to Ms Withers and Dr Turner, in so far as Ms Withers is a director of Meridian and/or Ms Withers and Dr Turner are directors of AIAL.

- 38 The Commission considers that Mr Boyd cannot rely on the conditions attached to Ms Withers and Dr Turner’s exemptions to act as a mechanism preventing AIAL from gaining an incentive or opportunity to inhibit competition in electricity markets. The Commission notes that the conditions of Ms Withers and Dr Turner’s exemptions apply only as long as their cross-involvements and that Mr Boyd’s cross-involvements may extend beyond this.

#### **Incentives or Opportunities of AIAL to Cross-subsidise Meridian’s Generation Activities From its Line Business Resulting from Mr Boyd’s Presence as Chairman of the AIAL Board and as a Director of Meridian**

- 39 The Applicant submitted that there is no current or proposed connection or relationship between the electricity supply business of Meridian and the electricity lines business of AIAL, in which Mr Boyd will be involved, that gives AIAL the ability to cross-subsidise Meridian’s generation activities.
- 40 Presently there is no connection or relationship between the two companies which would afford cross-subsidisation. However, the Commission considers there exists the potential mechanism, by which AIAL’s electricity lines business could be used to subsidise Meridian’s generation activities. This could occur via a use-of-system agreement negotiated between Meridian and AIAL, which did not provide a commercial return to AIAL, and that the opportunity for the negotiation of such an agreement could be influenced by the presence of Mr Boyd as a person having material influence in the two companies.
- 41 However, while Mr Boyd is cross-involved, providing no relationship or connection can be formed between the two companies which would afford the ability to cross-subsidise, the Commission considers that AIAL would have no incentives or opportunities to cross-subsidise Meridian’s generation activities from its lines businesses.

#### **A Relationship between Meridian and AIAL Not at Arms Length due to Mr Boyd’s Presence as a Director of both AIAL and Meridian**

- 42 Mr Boyd proposes to become a director of Meridian’s electricity supply business and to continue to be Chairman of AIAL’s electricity lines business. The two businesses will have, in common, a person deemed to have material influence on each. On the face of

it, the relationship between Meridian's electricity supply business and AIAL's electricity lines businesses will not be at arms length.

- 43 However, the Commission considers that the potential effects of the relationship not being at arms length can be tempered by the fact that there is no connection or relationship between the two companies and practically no method by which the non-arms length relationship could be used to promote the mischief which the EIR Act seeks to prevent. As a result, under these conditions, the Commission does not consider that the potential effects of the relationship not being at arms length would be likely to suborn the purposes of the EIR Act.

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

- 44 The Commission considers that provided there is no relationship between the two companies in which Mr Boyd would be cross-involved, his application passes the Commission's criteria for granting exemptions from section 17 of the EIR Act. Therefore, the Commission has decided to exempt Mr Boyd from the application of section 17 of the EIR Act subject to certain conditions.
- 45 In making its decision, the Commission has taken into account the fact specific circumstances revealed in Mr Boyd's application for exemption. Those facts are essentially the absence of any connection or relationship between the electricity supply and electricity line businesses of which Mr Boyd is involved. The Commission has made it a condition of the exemption that there should not in future be any connection or relationship between the two companies in respect of electricity supply or distribution whilst Mr Boyd remains involved in both. By this the Commission means that Meridian should not become an electricity retailer to consumers connected to AIAL's electricity distribution network.
- 46 Therefore, having considered the stated criteria, the Commission exempts Mr Boyd from the application of section 17 of the EIR Act, subject to the terms and conditions specified in the Notice of Exemption.
- 47 The Commission 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, exempts Mr Wayne Boyd from the application of section 17 of the Electricity Industry Reform Act 1998 in relation to a prohibited cross-involvement in an electricity lines and an electricity supply business.

The exemption is subject to the following terms and conditions:

- (a) That, Meridian Energy Ltd shall not enter into any kind of contract or arrangement with Auckland International Airport Ltd that relates to the use of Auckland International Airport Ltd's electricity distribution network whilst Mr Boyd is involved with both Meridian Energy Ltd and Auckland International Airport Ltd; and
- (b) That Mr Boyd informs the Commission if he becomes a director of any company other than those described in his application for exemption.

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 31<sup>st</sup> day of March 2005

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Paula Rebstock  
Chair