

Decision No. 619

Determination pursuant to the Electricity Industry Reform Act 1998 (EIR Act), in the matter of an application for an exemption of a cross-involvement to enable an electricity lines business to continue to meet its obligations to supply electricity in accordance with a 1927 agreement. The application is made by:

GORE DISTRICT COUNCIL

The Commission:

D R Bates QC
D F Curtin

**Summary of the
Application:**

Application by the Gore District Council pursuant to s 81 of the EIR Act for an exemption in relation to an agreement between itself and The Power Company that would enable The Power Company to continue to meet its obligations to supply electricity to the Gore District Council.

Determination:

The Commission determines that to consider Gore District Council's application for an exemption would exceed the empowering discretion in s 81 of the EIR Act.

Date of Determination:

27 September 2007

<p>CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKET</p>

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EXECUTIVE SUMMARY

The Application

- 1 On 19 July 2006 the Commerce Commission (the Commission) registered an application from the Gore District Council (the Council) for exemption in relation to an agreement between itself and The Power Company (TPC), an electricity lines business, under which TPC has an obligation to supply electricity to the Council.

Factual Background

- 2 The agreement to which the Council refers in its application was entered into by the predecessors of the Council and TPC in 1927 and includes provisions requiring TPC to supply electricity for certain specified purposes to the Council at the price of one penny per unit for all time hereafter.
- 3 In 2002, the Council constructed a combined aquatic centre and ice rink. The Council says supply of electricity to the aquatic centre would take the total amount of electricity currently supplied to the Council under the agreement over the 2.5 GWh per annum threshold permitted by the EIR Act. The Council, pursuant to s 81 of the EIR Act, seeks an exemption in relation to the 1927 Agreement between itself and TPC that would enable TPC to continue to meet its obligations to supply electricity to the Council.
- 4 The Council's application for exemption from the EIR Act is not made with any authority—express, implied or otherwise—to make such application on behalf of TPC. TPC does not seek and/or support this application for an exemption from the EIR Act.

Exemption

- 5 Section 81(1) of the EIR Act empowers the Commission with a discretion to exempt from the application of the EIR Act in certain circumstances. The issue for the Commission is whether considering the Council's application for an exemption would exceed the empowering discretion pursuant to s 81 of the EIR Act in the circumstances of this case.
- 6 The Commission considers that:
 - a) the language and statutory scheme of the EIR Act do not support consideration of an exemption from a party who is neither an electricity lines business, nor an electricity supply business, nor involved in either an electricity supply or lines business; and
 - b) it is not open to the Commission to use the administrative exemption mechanism in s 81—contrary to the will of TPC—to impose obligations or confer benefits upon TPC that TPC does not want.
- 7 The Commission considers that the discretion to exempt pursuant to s 81 is not available to it in the circumstances of the present case. The Commission concludes that to consider the Council's application for an exemption in relation to the 1927 Agreement between itself and TPC that would enable TPC to continue to meet its obligations to supply electricity to the Council would exceed the Commission's empowering discretion.

Determination

- 8 The Commission determines that to consider Gore District Council's application for an exemption would exceed the empowering discretion in s 81 of the EIR Act.

INTRODUCTION

- 9 On 19 July 2006 the Commerce Commission (the Commission) registered an application from the Gore District Council (the Council) for exemption in relation to an agreement between itself and The Power Company Limited (TPC), an electricity lines business, under which TPC has an obligation to supply electricity to the Council. Subsequently, the Council clarified that it is seeking an exemption for TPC to enable TPC to be involved in the supply of electricity to the Council under the agreement. It does not seek to exempt any other cross-involvement of TPC, if any exists.
- 10 For the purpose of considering this application for exemption, the Commission, in terms of s 73 of the Crown Entities Act 2004, has delegated its powers under s 81 of the EIR Act to D R Bates QC and D F Curtin, Commission Members.

PARTIES

The Applicant

- 11 The Council is a District Council constituted by the Local Government (Southland Region) Reorganisation Order 1989.

Other Parties

- 12 TPC is the local distribution network operator in Southland in all areas except Bluff and certain areas of Invercargill.

ISSUE

- 13 Section 81(1) of the EIR Act empowers the Commission with a discretion to exempt from the application of the EIR Act—including exemption from the prohibition on an entity being involved in both an electricity lines business and an electricity supply business—in certain circumstances.
- 14 The Council is neither an electricity lines business, nor an electricity supply business. The issue for the Commission is whether considering the Council's application for an exemption would exceed the empowering discretion pursuant to s 81 of the EIR Act in the circumstances of this case.

FACTS

The 1927 Agreement

- 15 In 1927 the Gore Borough Council entered into an agreement with the Southland Electric Power Board (the 1927 Agreement). In relevant part, the 1927 Agreement provided that:

- "15. THE Board further agrees to supply to the Council all electric energy required by the Council for street lamps, pumping water, sewage or other material, Town Hall and Borough Offices, Town Clock, all municipal buildings, including Fire Brigade Station, Electric-power Station, Public Library and other buildings under the control and management of the Council and all electric energy required by the Council for its own use in any municipal undertaking at the price of one penny per unit payable quarterly on the last days of March, June, September and December in each year, . . .
19. THE provisions of this Deed shall be binding upon the Board and Council for all time hereafter."

- 16 The Council is the successor of the Gore Borough Council. TPC is the successor of the Southland Electric Power Board.
- 17 The continuing effect of clauses 15 and 19 of the 1927 Agreement has been the subject of litigation between the Council and TPC. In the 1990s, matters went to the Court of Appeal. In a judgment dated 4 November 1996, the Court of Appeal confirmed that the 1927 Agreement continues to apply as between the Council and TPC, concluding that:
- the commitment of the Southland Electric Power Board to supply electricity for certain specified purposes at the price of one penny per unit for all time hereafter was not beyond the legal power or authority of the Board, falling squarely within the powers expressly conferred by the relevant statute, and should not be read down by reference to the provisions of the Public Works Regulations 1922 which concern charges for electricity;
 - inferring a right for TPC to terminate the 1927 Agreement on notice after a reasonable time had elapsed contradicts clause 19 and there is nothing in the 1927 Agreement or the surrounding circumstances to infer such a proposed implied term; and
 - while—as a whole—the high level of inflation in the 1970s and 1980s and the effects of the contract have changed in various ways since 1927, it is not to such a fundamental extent as to have brought the 1927 Agreement to an end by frustration.¹

Impact Of Passage Of The EIR Act On 1927 Agreement

- 18 On its inception, one of the key structural impacts of the EIR Act was to effect ownership separation between electricity supply and electricity lines businesses. When the EIR Act was passed in 1998, TPC elected to operate as an electricity lines business.
- 19 In 2002 the continuing effectiveness of the 1927 Agreement was considered by the High Court. TPC claimed that the EIR Act frustrated the 1927 Agreement. The Council disputed this and (primarily) sought declaratory relief as to the continuing validity of the 1927 Agreement.
- 20 His Honour, Justice William Young, noted that the proceedings were premature in a sense because the deferred operation of separation of ownership rules under the EIR Act meant that some of the issues identified by the parties were still hypothetical. That said, in deference to the arguments advanced on behalf of both the Council and TPC he considered two overlapping issues and went on to make declarations to the effect that:
- supply of electricity by TPC up to 2.5 GWh per annum does not have the effect of bringing TPC within the definition of an electricity supply business; and
 - the EIR Act has not frustrated the 1927 Agreement.²

Recent Events

- 21 In its application, the Council states³:
- “. . . in 2002 the Council constructed a combined aquatic centre and ice rink. The aquatic centre is a “municipal undertaking” within the former Borough geographic area and therefore falls within the scope of the Agreement.”

¹ *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 540-541.

² *Gore District Council v The Power Co Ltd* [2003] 1 NZLR 697.

³ *Application dated 18 July 2006 for an exemption pursuant to s 81 of the EIRA*, from Gore District Council; paragraphs 13 – 17.

- “Supply of electricity to the aquatic centre (in addition to the Council’s other municipal undertakings) would take the total amount of electricity currently supplied under the Agreement over the permitted threshold. It would render TPC a supply business and thus cross-involved under the EIR Act. TPC has given this as the reason for refusing to supply electricity to the aquatic centre. As a result, the Council has been forced to purchase electricity directly from a retailer (Contact Energy) for supply to the aquatic centre.”
 - “. . . [The aquatic centre] simply happens to have been an identifiable “trigger” that would take the Council’s usage over 2.5 Gwh per annum. Usage excluding the aquatic centre is currently just below the threshold, at 2.35 Gwh for the year to June 2006. While usage has been fairly constant over the last few years (with some increases offset by greater efficiencies in other areas) it could reach the threshold within the near future, regardless of supply to the aquatic centre.”
 - “The Council is now in a position where it must pursue a legal remedy, simply to ensure continuation of its legal rights. The Council believes that an exemption would preclude TPC from arguing that it is prevented from performing its legal obligations to the Council. Therefore in order to minimise further litigation and delay, the Council wishes to seek an exemption for the Agreement under the EIR Act, although the Council is not itself cross-involved.”
- 22 The Council wrote to TPC in May 2006 requesting that TPC apply for an exemption pursuant to s 81 of the EIR Act, stating⁴:
- “The Council notes that, under section 81 of that Act, an exemption can be sought from the Commerce Commission for performance of The Power Company’s obligations under the agreement. The Council’s legal advisors have considered the matter, and advise that this would be an appropriate matter for an exemption, and have rated the chances of success in any such application as high.”
 - “. . . [i]n the event that The Power Company does not apply for an exemption, the Council will apply for the exemption independently of The Power Company’s involvement.”
- 23 In response, TPC advised that “*[a]fter discussion the Directors resolved not to take any action with respect to the application to the Commerce Commission. . . . The Power Company Limited will comply with its obligations under the Penny-Per-Unit Agreement insofar as it is legally able to do so, however, it does not consider it should be taking any action and incurring costs which would not be in the interest of the majority of its consumers.*”⁵
- 24 The Council applied on 18 July 2006 to the Commission, pursuant to s 81 of the EIR Act, for an exemption in relation to the 1927 Agreement between itself and TPC that would enable TPC to continue to meet its obligations to supply electricity to the Council.

Position Of TPC In Relation To The Application For Exemption

- 25 Both the Council and TPC confirm that the Council’s application for exemption from the EIR Act is not made with any authority—express, implied or otherwise—to make such application on behalf of TPC. Further, TPC advises that it does not seek and/or support an application for an exemption from the EIR Act which would have the effect of the

⁴ Application dated 18 July 2006 for an exemption pursuant to s 81 of the EIRA, from Gore District Council; Appendix C.

⁵ Application dated 18 July 2006 for an exemption pursuant to s 81 of the EIRA, from Gore District Council; Appendix D.

Council's present application. TPC considers the exemption would increase the level of cross subsidy between consumers on TPC's network.⁶

RELEVANT LAW

26 The purposes of the EIR Act are set out in s 2. Section 2(1) and (2) provide:

- (1) The purpose of this Act is to reform the electricity industry to better ensure that—
 - (a) Costs and prices in the electricity industry are subject to sustained downward pressure; and
 - (b) The benefits of efficient electricity pricing flow through to all classes of consumers—
 by—
 - (c) Effectively separating electricity distribution from generation and retail; and
 - (d) Promoting effective competition in electricity generation and retail.
- (2) The particular purpose of Parts 1 to 5 (separation of lines and supply) is—
 - (a) To prohibit certain involvements in electricity lines businesses and electricity supply businesses which may create incentives or opportunities—
 - (i) To inhibit competition in the electricity industry; or
 - (ii) To cross-subsidise generation activities from electricity lines businesses; and
 - (b) To restrict relationships between electricity lines businesses and electricity supply businesses which may otherwise not be at arms length.

27 Additional provisions of the EIR Act, so far as they are relevant to this application, are set out below.

28 **Business** is defined in s 3(1) and “*means any undertaking that is carried on whether for gain or reward or not*”.

29 The definition of “electricity lines business” appears in s 4, and in relevant part provides:

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.
- (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:
 ...

30 The EIR Act also provides for the definition of “electricity supply business” in s 5:

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

31 Section 7 of the EIR Act provides for the definition of “involved” (relevantly):

⁶ Letter dated 8 September 2006 to the Commerce Commission from AWS Legal.

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

...

and involvement has a corresponding meaning.

- (2) Where a person is involved in an unseparated electricity business, the person is involved in both an electricity lines business and an electricity supply business.

32 Involvement in both electricity lines and electricity supply is expressly prohibited pursuant to s 17:

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.

Ability Of The Court To Intervene

- 33 Specific provision is made within the EIR Act for the Court to intervene in certain circumstances when satisfied that a contravention of the EIR Act arises.
- 34 Section 54 empowers the Court to order disposal of assets or voting securities of the cross-involved entity. The Court may also prohibit or declare void the exercise of voting or other rights attaching to voting securities, and may also direct a person to refrain from doing a specified act.
- 35 Section 56 empowers the Court to direct a cross-involved entity to renegotiate any agreement(s) contravening, or giving rise to a contravention of, the EIR Act. In the event that the Court is not satisfied that there has been compliance with such directions, it may:
- re-open the agreement and make orders for the purpose of reopening the transaction and setting aside the contravention, and reinstating the parties to their former position if appropriate; or
 - give directions concerning the business of the entity which is in contravention of the EIR Act, or management or administration of that business.
- 36 Where lawful agreements are in place, s 86(1) of the EIR Act provides:
- (1) An agreement lawfully entered into does not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of this Act.

ANALYSIS

Commission’s Discretion To Exempt

- 37 Section 81(1) of the EIR Act provides the Commission with a discretion to exempt from the application of the EIR Act:
- (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.

- 38 Section 81 of the EIR Act does not explicitly prescribe or limit exemption applicants. There is no statutory prohibition on any person making an application pursuant to s 81 of the EIR Act for an exemption. Notwithstanding this, all discretionary powers have objective limits of some kind, including s 81.

Limits On Discretion

- 39 The Commission's discretion may only be exercised "*for the purposes of the [EIR Act]*". The purposes outlined in s 2(1) of the EIR Act focus on reform of the electricity industry to better ensure that costs and prices in the electricity industry are subject to sustained downward pressure, and that the benefits of efficient electricity pricing flow through to all classes of consumers. The frame of reference for achieving that outcome is through effective separation of electricity distribution from generation and retail, and promotion of effective competition in electricity generation and retail. In relation to separation of electricity lines and supply, the purpose statement focuses on prohibiting certain involvements in electricity lines businesses and electricity supply businesses, and restricting relationships between electricity lines businesses and electricity supply businesses which may otherwise not be at arms length.
- 40 TPC falls within the electricity lines business definition in s 4(1)(a) and (b) of the EIR Act. In *Gore District Council v The Power Co Ltd*⁷, William Young J considered that TPC fell within the electricity supply business definition in s 5(1)(a) is a business that sells electricity in New Zealand (albeit at a loss). However, he also considered that the combined effect of ss 5 and 17 of the EIR Act were that an electricity lines business may sell up to 2.5 GWh per annum of electricity without infringing s 17(1). The Commission adopts the reasoning of William Young J (that so long as TPC is selling or generating less than 2.5 GWh per annum it is not within the electricity supply business definition in s 5) for the purposes of making its decision in relation to the Council's application.

Submissions from parties

- 41 The Commission sought submissions from both the Council and TPC on various points relating to this application for exemption. In relation to the Commission's empowering discretion in s 81, the Council submits that enabling an application by the Council is entirely consistent with the Parliamentary purpose in passing the EIR Act, and on the basis of the material provided in the Council's application it considers that the case for an exemption is clear. TPC submits that the Commission would be exceeding its discretionary powers in s 81 by determining the Council's application.
- 42 The Council contends that Parliament provided the exemption mechanism (s 81)—to accompany the prohibition on cross-involvement (s 17) and preservation of contractual arrangements (s 86)—to give the Commission a wide discretion to determine exemptions as it is able to assess market impact and conditions to counterbalance the wide scope of the s 17 prohibition in a manner that is not available to a Court through contractual remedies. Further, the Council recognises that alternative Court remedies in ss 54 and 56 are available to both TPC and the Council, but considers that neither of these provisions give it the remedy it seeks (to have the contract as it stands exempted from the EIR Act), and the availability of these remedies is not mutually exclusive to an exemption.
- 43 The Council submits that there is no precondition that an application must come from the cross-involved party requiring the benefit of exemption and the purposes of the EIR Act

⁷ *Gore District Council v The Power Co Ltd* [2003] 1 NZLR 697

support consideration of its application for exemption of TPC's business of supplying electricity to the Council under the 1927 Agreement as:

- interference with pre-existing long term contracts and arrangements was intended to be only to the extent necessary to preserve competition and prevent cross-subsidisation (and the Council asserts—in its initial application—that allowing the 1927 Agreement to continue in force does not undermine competition or allow cross-subsidisation);
- Parliament could not have intended s 86 to protect only an industry participant's rights under such contracts but must have also intended to ensure that obligations under such contracts continue where appropriate, so the Commission should not take a narrow approach to the issue of standing where that means the substantive merits of a particular application (ring-fenced to only the obligations under the 1927 Agreement) cannot be considered by the body with the appropriate expertise;
- the remedies in ss 54 and 56 are unlikely to be available in this case as TPC has not triggered the cross-involvement prohibition in s 17 of the EIR Act because it is not currently an electricity supply business, and the Council submits that even if the remedies in ss 54 and 56 were available, they are not the most appropriate solution to the issue; and
- where ambiguity in legislation exists, that ambiguity should be resolved strictly in favour of an interpretation which minimises the impact on personal rights.

44 TPC notes four points of particular importance in submitting that the Commission would exceed its discretionary powers in s 81 by determining the Council's application for exemption:

- the language and scheme of the EIR Act make it clear that an exemption under s 81 is intended for the benefit of a person operating an electricity supply or lines business who would otherwise be in contravention of EIR Act – the prohibitions in Part 2 apply only to a person involved in an electricity lines and/or supply business, the penalty provisions all apply to contraventions of Part 2 by that same person, and the exemption in s 81 is conferred on the Commission to exempt that “*person . . . from compliance with the provisions of this Act*”;
- the primary consideration for the Commission when determining whether to exercise its discretion must be whether the person intended to benefit from an exemption wants it, and in this case that person (TPC) does not;
- TPC would be adversely affected if the exemption sought by the Council were granted because TPC would be deprived of supplying the Council at, or more than, 2.5 GWh per annum and applying to the Court to re-open the 1927 Agreement under s 56 of EIR Act; and
- if the Commission were to foreclose TPC's option of having the contract re-opened and varied it would in effect be adjudicating a private contract dispute which is a matter for the parties, and the Court if necessary, but not for the Commission through its administrative power to grant exemptions.

45 The Commission has had regard to the submissions made, and the views expressed, by both the Council and TPC in reaching its decision.

Section 81 discretion

- 46 Section 81(1) of the EIR Act empowers the Commission with a discretion to exempt from the application of the EIR Act in certain circumstances. The Council is neither an electricity lines business, nor an electricity supply business. The issue for the Commission is whether considering the Council's application for an exemption would exceed the empowering discretion pursuant to s 81 of the EIR Act in the circumstances of this case.
- 47 Section 81 of the EIR Act does not explicitly prescribe or limit who may apply for an exemption. It is silent on this point.
- 48 Text and purpose are the key drivers of statutory interpretation and the meaning of the whole (or a portion) of an Act must be ascertained from its text and in light of its purpose.⁸ While s 81 confers a wide discretion on the Commission to exempt, that discretion is not absolute or unfettered, it is to be used to promote the policy and objectives of the EIR Act.⁹ The Supreme Court recently confirmed this position in *Unison Networks Limited v Commerce Commission*:

“A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker “so uses his discretion as to thwart or run counter to the policy and objects of the Act”. A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.”¹⁰

- 49 In considering whether, on application by the Council, the grant of an exemption to TPC (who do not want an exemption) is consistent with the statutory purpose of the EIR Act, (rather than going against that statutory purpose), the Commission notes the following characteristics of the statutory scheme of the EIR Act:
- the freedoms of electricity lines (and supply) business owners to conduct business as they see fit are restricted by the prohibition on cross-involvements (s 17), and rights relating to the benefit of a contract to sell electricity (s 5(1)(c)(ii)) – although not going so far as to make an agreement illegal or unenforceable (s 86);
 - the enforcement of contraventions of the EIR Act vests in the High Court, in particular the ability to direct negotiation or re-opening of agreements on the application of the Commission or any person (s 56);
 - section 81 of the EIR Act is an administrative, rather than an enforcement or penalty, provision, that vests in the Commission the discretion to grant exemptions from the prohibitions of the EIR Act (s 81);
 - the language and scheme of the EIR Act make it clear that an exemption under s 81 is intended for the benefit of a person operating an electricity supply or lines business who would otherwise be in contravention of EIR Act – the prohibitions in Part 2 apply only to a person involved in an electricity lines and/or supply business, the penalty provisions all apply to contraventions of Part 2 by that same person, where

⁸ *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36.

⁹ This general principle is recognised in relation to other legislation in cases such as *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Wellington City Council v Woolworths NZ Ltd (No. 2)* [1996] 2 NZLR 537 (CA) at 545.

¹⁰ *Unison Networks Limited v Commerce Commission* [2007] NZSC 74 at para 53.

the exemption in s 81 is conferred on the Commission to exempt that “*person . . . from compliance with the provisions of this Act*”; and

- the absence of a requirement in s 81 for the Commission to give notice to the person whose business involvement or interest is affected and to give them a reasonable opportunity to make submissions to the Commission, in contrast to s 80.

- 50 Consideration of the group of sections (ss 54, 56, 81, 86) which might apply when performance of a lawful agreement is in breach of the EIR Act illustrate that different discretionary remedies are available to different groups of people. Sections 54 and 56 provide for application to the Court being made by “the Commission or any other person”. Section 86 deals with contract. It provides that that an agreement does not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of the EIR Act, but that an agreement entered into in breach of the EIR Act is voidable at the option of “any party to the agreement who is not in breach of the [EIR Act]”.
- 51 The Council may seek remedies based on contract law in relation to enforcing the 1927 Agreement. Within the EIR Act, specific provision is made (for example in ss 54, 56, and 86) for situations where long-term arrangements associated with the supply of electricity would be affected. If TPC is required to sell electricity to the Council and this placed TPC at risk of breaching the EIR Act, or in breach of the EIR Act, s 56 empowers the High Court to direct renegotiation of existing agreements that contravene the EIR Act:

56 Other powers to give directions, re-open agreements

- (1) If the Court is satisfied, on the application of the Commission or any other person, that a person has contravened Part 2 or section 68, the Court may give directions ordering a person or persons in contravention to renegotiate any agreement or agreements that contravene, or give rise to a contravention of, this Act, on such terms as the Court specifies
 - (2) If directions under subsection (1) are not complied with to the satisfaction of the Court, the Court may –
 - (a) Re-open any agreement that contravenes, or gives rise to a contravention of, this Act and make any orders it deems just and equitable for the purpose of reopening the transaction and setting aside the contravention, and, if appropriate, reinstating the parties as nearly as may be in their former positions; or
 - (b) Give directions concerning the business or property of the person, or the management or administration of that person's business or property (including a direction that a person cease to be a manager of the business), and every person is bound by the directions.
- 52 The Commission notes that this interpretation is supported in the comments of William Young J when he considered their potential application to the 1927 Agreement between the Council and TPC:

“[45] When the [EIR Act] was enacted it must have been anticipated that some long-term arrangements associated with the supply of electricity would be affected. Sections 54, 56 and 86 are addressed to this possibility. Their combined effect leaves me with the view that it was not the parliamentary intention that the rights under long-term supply agreements would be, in effect, expropriated. If it were to become illegal for the company to continue to sell electricity to the council, I would expect this Court to be required to adjust the rights of the parties under ss 54 and 56. My anticipation is that this would require the company to pay to the council the assessed net present value of the council's entitlement under the 1927 agreement. Sections 54 and 56 would appear to be addressed to problems of this sort which would arise at the point when supply reaches or exceeds 2.5 GWh per annum. *In that sense, those sections are far more specific to the situation at hand than the general provisions of the Frustrated Contracts Act 1944 and they must therefore, in accordance with all orthodox statutory principles, be taken to govern the situation.* [Emphasis added]

[46] I note that one outcome which is possible (although no doubt would be unpalatable for the company) is that the company could be ordered to divest itself of its lines business. This would then remove any legal impediment to it continuing to supply electricity to the council. I simply note this in passing as it would involve a solution to the problem that might be thought to involve the tail wagging the dog.”¹¹

- 53 The Commission considers that there are provisions in the EIR Act that are far more specific to dealing with long term arrangements associated with the supply of electricity such as the rights of the Council and TPC under the 1927 Agreement than the Commission’s discretion to exempt pursuant s 81. Those issues need to be resolved by the Court, if necessary.
- 54 The provisions in the EIR Act referred to above provide a path and options for dealing with contractual arrangements as in the present case. Those options sit with the Court. Here, the Council seeks the exercise of the Commission’s discretion to alter the impact of contractual arrangements in the 1927 Agreement. As the ability to alter the impact of contractual arrangements is a power specifically vested in the Court for contravention of the EIR Act, the Commission also considers that it is not open to it to use the administrative exemption mechanism in s 81. Furthermore, the Commission does not consider that s81 was designed (given the other remedies) to be used - contrary to the will of TPC— to impose obligations or confer benefits upon TPC that TPC does not want. The Court of Appeal has previously recognised such considerations.¹²

CONCLUSION

- 55 Section 81(1) of the EIR Act empowers the Commission with a discretion to exempt from the application of the EIR Act in certain circumstances. The issue for the Commission is whether considering the Council's application for an exemption would exceed the empowering discretion pursuant to s 81 of the EIR Act in the circumstances of this case.
- 56 The Commission considers that:
- the language and statutory scheme of the EIR Act do not support consideration of an exemption from a party who is neither an electricity lines business, nor an electricity supply business, nor involved in either an electricity supply or lines business; and
 - it is not open to the Commission to use the administrative exemption mechanism in s 81—contrary to the will of TPC—to impose obligations or confer benefits upon TPC that TPC does not want.
- 57 In the Commission’s view, to consider the Council's application for an exemption in the present circumstances would exceed the empowering discretion to exempt pursuant to s 81 of the EIR Act.

¹¹ *Gore District Council v The Power Co Ltd* [2003] 1 NZLR 697 at paragraphs [45] and [46].

¹² *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA)

THE COMMISSION'S DETERMINATION

58 The Commission determines that to consider Gore District Council's application for an exemption would exceed the empowering discretion in s 81 of the EIR Act.

Dated this 27th day of September 2007

Denese Bates QC
Commission Member