



COMMERCE COMMISSION

Decision No. 536

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:

WESTFIELD TRUST (NZ) LIMITED

The Commission:

Paula Rebstock
Peter JM Taylor

Summary of the Application:

Westfield Trust (NZ) Limited, entities related to Westfield Trust (NZ) Limited 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 Westfield Trust (NZ) Limited, entities related to Westfield Trust (NZ) 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. The exemption is subject to the terms and conditions stated in this decision.

Date of Determination:

29 September 2004

Date of Exemption:

The exemption takes effect from 14 November 2004, which will be the date one month from the date that the Notice of Exemption is published in the *Gazette*.

CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKETS

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INTRODUCTION

- 1 On 2 December 2003 the Commerce Commission (the Commission) received an application from Westfield Trust (NZ) Limited (Westfield or Applicant) for an exemption under section 81 of the EIR Act (the Application). The Application was made by Westfield on behalf of itself and the entities referred to in Appendix A of the Application (collectively referred to as the Westfield Group). Appendix A of the Application is repeated as Appendix 1 of this Decision.
- 2 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.
- 3 The Commission’s powers to exempt businesses, involvements or interests from the application of the EIR Act or persons from compliance with any provisions of any regulations made under the EIR Act are specified in s 81 of the EIR Act.
- 4 In making its decision the Commission notes that the facts revealed in the Application are particular to the Westfield Group’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

- 5 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, Chair, and Peter JM Taylor, Commissioner.
- 6 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

- 7 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.3.¹
- 8 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

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

- (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.”

9 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,⁽²⁾ expected.”

10 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)³ 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.”

PARTIES

The Applicants

11 The Application has been made by Westfield on behalf of a number of companies and trusts that are deemed to come within the scope of the EIR Act. These parties are listed in Appendix 1 of this decision.

² For example, of the types provided for in s 19 of the EIR Act.

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

The Westfield Group

- 12 Westfield Group is a vertically integrated shopping centre organisation involved in funding, creating and managing shopping centres. Westfield Group owns and operates numerous shopping centres in New Zealand.
- 13 As part of the Westfield Group's shopping centre business, it typically sells electricity to tenants. When the EIR Act came into force, Westfield Group opted to comply with the statute by undertaking corporate separation of its electricity lines and electricity supply businesses pursuant to section 24 of the Act. Due to the expiration of corporate separation as a means of complying with the EIR Act on 31 December 2003, Westfield lodged an application for exemption with the Commission.

SUPPLY OF ELECTRICITY

Supply of Electricity to Tenants of the Westfield Group

- 14 The Westfield Group generally purchases electricity in bulk from an electricity supplier and then sells the electricity to its tenants. There are two main exceptions to this. Firstly, Westfield Chartwell operates as a fully reconciled embedded network⁴ and tenants do not take their supply of electricity from it. Secondly, a small number of major tenants take supply completely independently from the electricity infrastructure of the shopping centres owned by the Westfield Group. This allows them to take advantage of rates offered within their own group electricity contracts (for instance [] at Westfield Glenfield). A table identifying how many tenants currently take their supply from the Westfield Group on a shopping centre by centre basis is set out at Appendix C of the Application.
- 15 The amount of electricity conveyed and supplied by Westfield Group to its tenants exceeded the 2.5 gigawatts per annum threshold set out in sections 4(2)(a) and 5(2)(a) of the EIR Act as at 3 June 2003. The Westfield Group conveys approximately [] kWh per annum of electricity on its internal wiring systems. Out of this amount, [] kWh is supplied by the Westfield Group to its tenants, [] kWh is used in providing common services and in the common areas of shopping centres (common services), and at least [] kWh is supplied to tenants by alternative electricity retailers. A schedule setting out the amount of electricity supplied to tenants and used for common services at each shopping centre is set out at Appendix D of the Application.
- 16 In most instances at the properties where the Westfield Group sells electricity to tenants, the relevant lessor has the right under the terms of its standard lease (known as the specialty shop lease) to require tenants to purchase electricity from it. Clause 8.10.3 of the Westfield Group's standard specialty shop lease terms specifies that the maximum price that it can charge tenants for electricity cannot be more than the tenants would have to pay for the same amount of electricity on a stand-alone basis. While the Westfield Group has specific leases with major customers such as [], their terms relating to electricity are broadly similar to clause 8.10 (including clause 8.10.3) of the standard lease.

⁴ Tenants are free to take supply of electricity from any energy retailers trading in the open market. The Westfield Group derives its income here from charging energy retailers for the right to access the lines network. The incumbent energy retailer is responsible for reconciliation of the site within the local network area (as is required under the Electricity Governance Rules).

- 17 Since August 2000, the Westfield Group has been party to a national supply contract for electricity supply to its shopping centres with [] (in 2000), [] (in 2001) and [] (since 2002).

Supply of Electricity for Common Services

- 18 The Westfield Group purchases electricity to provide the common services at its shopping centres. These include lighting common areas, lighting in car parks 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 Westfield Group, on an apportioned basis, from liable tenants as part of the operating expenses charge. []

Current Arrangements in Relation to Supply of External Lines

- 19 The Westfield Group does not sell electricity or own or operate any electricity conveying system outside of its shopping centres.
- 20 The local electricity lines network operator invoices the Westfield Group for the supply of external lines services to particular shopping centres, ie to meet the demand of the relevant tenants and in respect of common services. This applies regardless of whether those tenants take their supply of electricity from the Westfield Group or another electricity retailer.
- 21 Where the Westfield Group sells electricity to its tenants the Westfield Group includes a component for external lines charges in the electricity price. Where tenants take their supply of electricity directly from the electricity retailer of their choice, the Westfield Group still charges for the supply of external lines services invoiced to it by the local network operator. The Westfield Group does this by charging the retailer for these services.
- 22 Westfield submits that, where the local lines network operator invoices the Westfield Group directly for supply of its external lines services and the Westfield Group in turn charges its tenants or retailers for those external lines services, the Westfield Group does not operate an electricity lines business as:
- it does not convey electricity in New Zealand through those external lines since that is done instead by the local lines network operator (s4(1)(a)); and
 - it does not own directly or indirectly those external lines in New Zealand since they are owned by the local lines network operator (s4(1)(b)).
- 23 Westfield asserts that tenants are not charged more for external line services than they would otherwise be charged on a stand-alone basis. However, as the Westfield Group can achieve a lower external lines rate, due to volume, than a stand-alone tenant could achieve, the charge for external lines services often includes a margin that is of a value up to the difference between the actual cost of delivery and the 'stand-alone' rate. Westfield have informed the Commission that, across its shopping centres, this margin varies between [] and the total value of the margin across all shopping centres for the year ended June 2003 was []. It is not clear to the Commission that the Westfield Group has any right (under the current leases supplied to the Commission) to recover these charges from tenants as part of the electricity charge.

Embedded Electrical Wiring Systems

- 24 Electricity supplied by the Westfield Group is conveyed by means of the existing embedded electrical wiring systems within the various shopping centres owned by members of the Westfield Group.
- 25 When the EIR Act came into force, it exempted the Westfield Group from the ownership separation rules in respect of its existing cross-involvements in lines and electricity supply businesses until 31 December 2003 (s28), provided that these businesses were carried on in different companies (s24) and complied with the arms length rules of the EIR Act (s25). In order to comply with this requirement, each of the shopping centres in the Westfield Group sold the internal embedded wiring systems within their shopping centres to a separate but wholly owned company called Abyssinian Holdings Limited. (The only exception was Manukau City Centre Limited which sold its internal embedded wiring system to a separate company called Gloriana Holdings Limited which was half owned by the Manukau City Centre Limited and half owned by the National Mutual Life Association of Australia Limited.) Accordingly, the Applicant submits that the Westfield Group complied in full with the corporate separation and arms length rules in the EIR Act for operating the lines and supply businesses.
- 26 Gloriana Holdings Limited has now ceased to exist as a company and its assets have been amalgamated with those of Abyssinian Holdings Limited.
- 27 Subject to the outcome of this exemption application, the Applicant submits that it is likely that the Westfield Group will transfer the ownership of Abyssinian Holdings Limited to Westfield Alliances (NZ) Pty Limited. It is also likely that this company will be responsible for entering into contracts for the purchase of electricity.

THE EXEMPTION SOUGHT BY THE WESTFIELD GROUP

- 28 The exemption sought by the Westfield Group relates to its ownership of various shopping centre properties. The Westfield Group 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:
 - Chartwell Shopping Centre Limited;
 - Downtown Shopping Centre Limited;
 - Glenfield Mall Limited;
 - Manukau City Centre Limited;
 - The Pakuranga Plaza Limited;
 - Queensgate Centre Limited;
 - Riccarton Shopping Centre (1997) Limited;
 - Shore City Centre (1993) Limited;
 - St Lukes Square (1993) Limited;
 - WestCity Shopping Centre Limited;
 - Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited;

- St Lukes Group No. 2 Limited;
 - Westfield Trust (NZ) Limited;
 - Westfield (New Zealand) Limited;
 - St Lukes Group Limited;
 - St Lukes Group Holdings Limited;
 - Abyssinian Holdings Limited; and
 - Westfield Alliances (NZ) Pty Limited.
- 29 The Applicant 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 services and, on an apportioned basis, charged to liable tenants by way of operating expenses. In accordance with Decision 351A, *Trans Tasman Properties Limited*, 6 May 1999 (the Trans Tasman Properties decision), the Westfield Group submits that the purchase and supply of electricity to run common services (the cost of which is recovered as part of the operating expense charge) does not constitute an “electricity supply business” for the purposes of the EIR Act.
- 30 The Applicant also notes that in Decision No. 514, *AMP Diversified Property Trust*, 2 December 2003 (the ADP decision), the ADP group of companies sought an exemption for any person who acquired more than 10% of the securities in Stockland in the future. While the Westfield Group considers that such an exemption is not likely to be applicable to its circumstances, it sees merit in including this request in order to preserve future flexibility. Accordingly, the Applicant also sought an exemption for any persons who, from time to time, acquire more than 10% of the securities in any of the Westfield Group of companies listed in Appendix A of the Application, or any new companies notified to the Commission under paragraph 43(b) of the Application under the conditions set out in paragraph 40(b) of the Application.
- 31 The scope of the exemption sought (on 2 December 2003) under section 81 of the EIR Act from the application of section 17 of the EIR Act in respect of the above-mentioned entities was set out in the Application in two parts:
- Part A: Short term exemption. If for any reason the Commission is not able to issue its determination on the Application for a permanent exemption under Part B of this exemption application below prior to 31 December 2003, then the Applicant sought a short term exemption under s81 of the EIR Act from the application of s17 of that Act as follows:
 - to the date of the Commission's determination, assuming that the Commission approves the Application for a permanent exemption under Part B of this exemption application; or
 - for three months after the date of the Commission's determination if the Commission does not approve the Westfield Group's application for a permanent exemption under Part B below. This time period is necessary so that the Westfield Group can put in place alternative arrangements to ensure that it does not have a prohibited cross-involvement under the EIR Act. Because the application date was so close to 31 December 2003, the Applicant requested that a short term exemption of this time period apply to any such negative determination by the Commission (even if given prior

to 31 December 2003) to ensure that alternative arrangements can be put in place.

- The Applicant submits that a short term exemption under either of these bases will not create incentives or opportunities to inhibit competition. Because of the short term nature of this exemption, the Westfield Group will have no reason to try and inhibit competition (or any time to actually do this) as no significant benefits could be obtained from any lessening of competition over such a short period. Alternatively, even if contrary to the Applicant's views the Commission considers that incentives or opportunities to inhibit competition would be created, due to the short term nature of the exemption these would only be minimal and therefore the purposes of the EIR Act would not be defeated.

- Part B: Permanent Exemption. This refers to the Commission's substantive decision.

32 The Applicant submits that, if the Commission is prepared to grant the exemption, it should be substantially the same (based on the same conditions) as that granted in Decision No. 458, *Capital Properties Limited*, 3 March 2002 (Capital Properties Decision) which was in turn based on the conditions imposed in the Trans Tasman Property Decision, namely:

- (a) The Westfield Group will not charge tenants (or anyone else) for the use of the internal embedded wiring systems within its shopping centres.
- (b) The Westfield Group will allow access to the internal embedded wiring systems within its shopping centres on reasonable terms and within a reasonable time to any electricity supply business to enable that electricity supply business to supply electricity to any tenant of the Westfield Group connected to such systems.
- (c) The Westfield Group will not enforce any of its existing lease clauses which allow it to require tenants to obtain electricity from or through the Westfield Group in order that any tenant can obtain electricity from or through any alternative electricity supplier it so chooses.
- (d) The Westfield Group will continue to provide consumption and billing information to its tenants in the form of the invoice set out in Appendix F, or any other information the Commission specifies, to enable tenants to assess competitive options available to them for the supply of electricity.

33 The Applicant submits that it is also willing to accept the additional condition imposed in the ADP Decision, namely:

- (a) The Westfield Group will:
 - notify, within three months, those tenants who have lease clauses which allow the Westfield Group the option of supplying electricity to them that the Westfield Group will not enforce these clauses; and
 - notify any new tenants, after the date of this exemption, who have lease clauses which allow the Westfield Group the option of supplying electricity that the Westfield Group will not enforce these clauses or alternatively that the Westfield Group will provide in the leases for those tenants that they can choose their own electricity supplier.

- 34 In addition to the current “cross-involvement” identified in the Application for which the Applicant seeks an exemption from the application of section 17 of the EIR Act, the Westfield Group has recognised that future property investment and management activities it might undertake would be in contravention of the EIR Act. The Applicant therefore also seeks exemption from the application of the EIR Act in respect of such activities, subject to the conditions referred to in paragraphs 32 and 33 above, on the basis set out in the Capital Properties Decision, namely:
- (a) the Westfield Group will comply with the conditions set out in paragraphs 32 and 33 above; and
 - (b) the Westfield Group will inform the Commission of the details of any future property investment and/or management activity (including company purchases or formation) 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 the Westfield Group and/or any other persons are likely to rely on this exemption.
- 35 The future property investment activities for which the Applicant seeks exemption have been specified in the Application in two parts. First, the Applicant states that the Westfield Group’s property investment business involves the ongoing sale and purchase of property owning companies and/or properties. The Applicant recognises that each time the Westfield Group 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. The Applicant 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, the Applicant notes that, in some circumstances, by acquiring a new property owning company and/or property the Westfield Group may also be in breach of section 18 of the EIR Act (ie the 20% aggregate cross-ownership prohibition). Although the Applicant considers that the conduct that s18 of the EIR Act prohibits would be covered by an exemption under s30 of the EIR Act, nonetheless it has included the request for the sake of completeness.
- 36 The Westfield Group 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.

Future Exit & Re-Entry Issues Relating to Supply of Electricity

- 37 The Westfield Group is uncertain what level of involvement in the electricity industry is most appropriate for the Westfield Group (i.e. whether it is preferable for the Westfield Group to be a "lines only" company or to remain as a supplier of electricity to its tenants as well). The Applicant considers the merits of any approach adopted by the Westfield Group may well change over time depending on what happens in the electricity industry. It is therefore quite possible that in the future the Westfield Group may choose not to supply any of its tenants at its shopping centres with electricity. The Applicant submits that in that event the Westfield Group would no longer have a prohibited cross-involvement under s17 of the EIR Act as it would not be involved in an electricity supply business under s5 of the EIR Act. Therefore it would no longer need to rely on the terms of a determination by the Commission granting an exemption on the basis of the Conditions above.

38 However, as a result of market conditions, the Westfield Group considers it may then decide to recommence supplying tenants at some or all of its shopping centres with electricity and would need to rely on the exemption again. Since the Westfield Group is seeking a permanent exemption which remains in force until it is revoked by the Commission (as set out in s81 of the EIR Act), it does not consider that it would need to revert back to the Commission to obtain a further exemption in these circumstances. However, the Applicant proposes that in the event of the Westfield Group exiting or re-entering the electricity supply business the Westfield Group will give the Commission written notice of that fact for the Commission's records.

Timing of implementation of exemption conditions

39 The Applicant states that the Westfield Group will implement the exemption conditions no later than 31 December 2003 (at which time its current exemption under section 28 of the EIR Act expires), or three months after the Commission grants an exemption to the Westfield Group, whichever is the later.

40 However, the Commission considers that following 31 December 2003 the Westfield Group requires an exemption published in the *NZ Gazette* as it would be in breach of the EIR Act but for the exemption.

41 The Commission issued a temporary exemption to the Westfield Group, whilst the Application was being considered which took effect from 1 January 2004 continuing until either a permanent exemption takes effect or for a period of three months after the date of the release of the Commission's determination, if the Commission declines the permanent exemption.

INVOLVEMENTS AND PROHIBITED CROSS-INVOLVEMENTS

42 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.”

43 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).

44 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.”

45 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.”

46 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.”

47 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.

48 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.”

49 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.

50 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

51 The Commission considered the application of the EIR Act in relation to investment properties in the Trans Tasman Properties decision and Decision 373, *AMP Asset Management New Zealand Limited*, 29 September 1999 (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.

52 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 the Westfield Group, are electricity lines businesses under section 4 of the EIR Act:

- Abyssinian Holdings Limited because it:
 - owns, directly, lines that convey electricity in New Zealand, being the internal electrical wiring systems at the existing Westfield Group shopping centres listed in Appendix A of the application (s4(1) of the EIR Act); and
 - is not exempt from the meaning of "electricity lines business" through s4(2).
- St Lukes Group Holdings Limited because it:
 - owns, indirectly, through Abyssinian Holdings Limited, lines that convey electricity in New Zealand (s4(1)); and
 - is not exempt from the meaning of "electricity lines business" through s4(2).
- St Lukes Group Limited because it:
 - owns, indirectly, through St Lukes Group Holdings Limited, lines that convey electricity in New Zealand (s4(1)); and
 - is not exempt from the meaning of "electricity lines business" through s4(2).
- Westfield Trust (NZ) Limited because it:
 - owns, indirectly, through St Lukes Group Limited, lines that convey electricity in New Zealand (s4(1)); and

- is not exempt from the meaning of "electricity lines business" through s4(2).
- 53 The Commission also concludes that the electricity lines businesses identified in paragraph 52 above are considered to be 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 (section 7(1)(b)); and
 - have material influence over their electricity lines businesses (section 7(1)(c)).
- 54 The Commission considers that the following entities, for which an exemption from the application of the EIR Act is sought by the Westfield Group, may in future be electricity lines businesses under s5 of the EIR Act:
- Chartwell Shopping Centre Limited, Downtown Shopping Centre Limited, Glenfield Mall Limited, Manukau City Centre Limited, The Pakuranga Plaza Limited, Queensgate Centre Limited, Riccarton Shopping Centre (1997) Limited, Shore City Centre (1993) Limited, St Lukes Square (1993) Limited, WestCity Shopping Centre Limited, and St Lukes Group No. 2 Limited (in their capacity as shopping centre owners) because they may each in future re-acquire the direct ownership of the internal lines systems in their centres from Abyssinian Holdings Limited and/or Westfield Alliances (NZ) Pty Limited. Therefore at that stage they would own directly lines that convey electricity in New Zealand being the internal electrical wiring systems at these shopping centres (s4(1) of the EIR Act), and would not be exempt from the meaning of "electricity lines business" through s4(2).
 - Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited (in their capacity as shopping centre owners) because once shopping centres are developed on their land they may each in future acquire the direct ownership of the internal lines systems in their centres. Therefore at that stage they would own directly lines that convey electricity in New Zealand being the internal electrical wiring systems at these shopping centres (s4(1) of the EIR Act), and would not be exempt from the meaning of "electricity lines business" through s4(2).
 - Westfield (New Zealand) Limited (in its capacity as the Property Manager) because it may in future be involved in an electricity lines business under s7(1)(c) in that it may manage Abyssinian Holdings Limited and/or Westfield Alliances (NZ) Pty Limited and therefore be deemed to have material influence over an electricity lines business under s11(1)(a).
 - Westfield Alliances (NZ) Pty Limited because it may in future acquire the direct ownership of Abyssinian Holdings Limited. Therefore at that stage it would own, directly, lines that convey electricity in New Zealand being the internal electrical wiring systems at the Westfield Group shopping centres listed in Appendix A of the application (s4(1) of the EIR Act), and would not be exempt from the meaning of "electricity lines business" through s4(2).

Electricity Supply Business and Involvements

- 55 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 the Westfield Group, are electricity supply businesses under section 5 of the EIR Act:

- Downtown Shopping Centre Limited, Glenfield Mall Limited, Manukau City Centre Limited, Queensgate Centre Limited, Riccarton Shopping Centre (1997) Limited, Shore City Centre (1993) Limited, St Lukes Square (1993) Limited, WestCity Shopping Centre Limited, and St Lukes Group No. 2 Limited (in their capacity as shopping centre owners) because they:
 - sell electricity in New Zealand (section 5(1)(a)(i));
 - 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).
 - St Lukes Group Holdings Limited because it:
 - owns, indirectly, through Downtown Shopping Centre Limited, Glenfield Mall Limited, Manukau City Centre Limited, Queensgate Centre Limited, Riccarton Shopping Centre (1997) Limited, Shore City Centre (1993) Limited, St Lukes Square (1993) Limited, WestCity Shopping Centre Limited, and St Lukes Group No. 2 Limited, the core assets of an electricity retail business (s5(1)(c)(ii)); and
 - is not exempted from the meaning of "electricity supply business" through s5(2).
 - St Lukes Group Limited because it:
 - owns, indirectly, through St Lukes Group Holdings Limited, the core assets of an electricity retail business (s5(1)(c)(ii)); and
 - is not exempted from the meaning of "electricity supply business" through s5(2).
 - Westfield Trust (NZ) Limited because it:
 - owns, indirectly, through St Lukes Group Limited, the core assets of an electricity retail business (s5(1)(c)(ii)); and
 - is not exempted from the meaning of "electricity supply business" through s5(2).
- 56 The electricity supply businesses identified in paragraph 55 above are considered to be 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 (section 7(1)(b)); and
 - have material influence over their electricity supply businesses (section 7(1)(c)).
- 57 The following entity is also considered to be involved in the above electricity supply businesses:
- Westfield (New Zealand) Limited (in its capacity as the Property Manager) because it manages the Westfield Group shopping centres listed in paragraph 28 above, including the purchase and re-selling of electricity on their behalf. It is therefore involved in

these companies' electricity supply businesses under s7(1)(a) and s7(1)(c) in that it has material influence over them under s11(1)(a).

- 58 The Commission considers that the following entities, for which an exemption from the application of the EIR Act is sought by the Westfield Group, may in the future be electricity supply businesses under s5 of the EIR Act:
- Abyssinian Holdings Limited because it may in the future enter into electricity purchase contracts with retailers on behalf of the Westfield Group and sell that electricity to the Westfield Group shopping centres. Therefore at that stage it would sell electricity in New Zealand (s5(1)(a)), own directly the benefit of a contract to sell electricity (s5(1)(c)(ii)), and would not be exempt from the meaning of "electricity supply business" through s5(2).
 - Westfield Alliances (NZ) Pty Limited because it may in the future enter into electricity purchase contracts with retailers on behalf of the Westfield Group and sell that electricity to the Westfield Group shopping centres. Therefore at that stage it would sell electricity in New Zealand (s5(1)(a)), own directly the benefit of a contract to sell electricity (s5(1)(c)(ii)), and would not be exempt from the meaning of "electricity supply business" through s5(2).
 - Chartwell Shopping Centre Limited, The Pakuranga Plaza Limited, Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited (in their capacity as shopping centre owners) because they may in the future sell electricity in New Zealand to their tenants (s5(1)(a)), own directly the benefit of a contract to sell electricity to its tenants (s5(1)(c)(ii)), and would not be exempted from the meaning of "electricity supply business" through s5(2). Currently none of these companies supply electricity to their tenants.
- 59 The supply of electricity for the purpose of providing common 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

- 60 Accordingly the Westfield Group 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 or future prohibited cross involvements in relation to the Westfield Group's shopping centre properties:
- Chartwell Shopping Centre Limited;
 - Downtown Shopping Centre Limited;
 - Glenfield Mall Limited;
 - Manukau City Centre Limited;

- The Pakuranga Plaza Limited;
- Queensgate Centre Limited;
- Riccarton Shopping Centre (1997) Limited;
- Shore City Centre (1993) Limited;
- St Lukes Square (1993) Limited;
- WestCity Shopping Centre Limited;
- Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited;
- St Lukes Group No. 2 Limited;
- St Lukes Group Holding Limited;
- St Lukes Group Limited;
- Westfield Trust (NZ) Limited;
- Westfield (New Zealand) Limited;
- Abyssinian Holdings Limited; and
- Westfield Alliances (NZ) Pty Limited.

- 61 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 the Westfield Group's activities only relate to the retail sale of electricity to tenants.
- 62 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, are not considered 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?

- 63 The EIR Act requires 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.

- 64 As in the Trans Tasman Properties 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.
- 65 The Applicant has submitted 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 given certain conditions. At paragraph 42 of the Application, the Applicant stated:
- “The Westfield Group submits that these steps will ensure that there is no opportunity for it to inhibit competitive electricity supply to its tenants in the relevant electricity retail market either now or in the future. The Westfield Group’s tenants will be free to choose their electricity supplier. As found by the Commission at paragraph 32 of the Commission’s exemption to Capital Properties Limited (Decision 458), the leasing of the Westfield Group’s properties occurs in a competitive property market and such competition for tenants mitigates the incentive or opportunity for the Westfield Group to attempt to raise electricity prices by anti-competitive behaviour.”
- 66 The Applicant accepts that a decision by the Commission to grant an exemption for the cross-involved entities should include the conditions set out in paragraphs 32 and 33 above, which it considers are consistent with the Commission’s terms and conditions in the ADP and Trans Tasman Properties decisions, and other similar decisions under section 81 of the EIR Act.
- 67 In addition to the current cross-involvements through the cross-involved entities, the Applicant also seeks an exemption from the application of the EIR Act for future property investment and management activities the Westfield Group might undertake: specifically, this includes the purchase by the Westfield Group of property owning companies and/or properties.
- 68 In respect of any future property investments, the Westfield Group 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’ the Westfield Group will breach the prohibitions on cross-involvements.
- 69 The Applicant states that by obtaining an exemption now for the Westfield Group’s 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.
- 70 If the Commission decides to grant the Westfield Group an exemption in respect of potential future property investment and management activities undertaken by it, the

Westfield Group submits that the exemption should be on the same conditions as those imposed in the Capital Properties Decision in respect of those activities which are set out in paragraph 34 above.

- 71 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 the Westfield Group might undertake will not provide it with opportunities to inhibit competition in the national electricity retail market, so long as those 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 it is relying on the exemption from the Commission.
- 72 The Applicant also seeks an exemption for any person who, from time to time, acquires more than 10% of the securities in it, on the same terms as that given in the ADP decision.
- 73 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 the Westfield Group.
- 74 The Applicant also considers that conditions in the electricity industry may be such that the Westfield Group may choose not to supply electricity to its tenants, but that at some time in the future it may again choose to supply electricity to its tenants. The Applicant considers that should the Westfield Group recommence supplying electricity to its tenants, the exemption granted by the Commission would still be in force. The Applicant proposes that in the event of the Westfield Group exiting or re-entering the electricity supply business the Westfield Group will give the Commission written notice of that fact.
- 75 The Commission will include an additional condition addressing this matter. However, the Commission specifically notes that the information which it receives from Westfield Group under conditions may be used by the Commission for any purpose relevant to the exercise of its powers or discretions, or otherwise in connection with the performance of its functions, under the EIR Act.
- 76 Finally, where the Westfield Group sells electricity to its tenants, it passes on the external lines charges from the local network operator and adds a margin to this charge. The Applicant submitted that, where the local lines network operator invoices the Westfield Group directly for supply of its external lines services and the Westfield Group in turn charges its tenants or retailers for those external lines services, the Westfield Group does not operate an electricity lines business as:
 - it does not convey electricity in New Zealand through those external lines since that is done instead by the local lines network operator (s4(1)(a)); and
 - it does not own directly or indirectly those external lines in New Zealand since they are owned by the local lines network operator (s4(1)(b)).
- 77 The Commission sought further submissions from the Applicant as to whether Westfield Group are deemed to be cross involved with respect to these lines in accordance with the EIR Act and as to the jurisdiction of the Commission to impose a condition regarding this issue.
- 78 The Applicant submitted that, as a matter of statutory interpretation and administrative law, the Commission's jurisdiction is restricted to the actual areas of cross-involvement as defined in the EIR Act. Further, it submitted that for the reasons outlined above the

Westfield Group is not operating an electricity lines business in respect of the external lines and is therefore not cross-involved in terms of those lines.

- 79 The Applicant conceded that the Westfield Group's ability to collect a margin on these lines stems from its ownership of the internal network at its shopping centres but submitted that the critical question is 'what' the margin is collected for rather than 'how' it is collected. The Applicant submitted that the margin is for external lines and not the internal network.
- 80 The Applicant also submitted that the charging of a margin on external lines services is not contrary to the purposes of the Act. The purposes of the EIR Act and the particular purpose of Parts 1 to 5 of the Act (which relate to separation of lines and supply) are set out in section 2 of the EIR Act and are as follows.
- (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.
- 81 The Applicant submitted that attempting to set the level of external lines charges is not the function of the EIR Act under s2(1)(a). Rather that is an issue dealt with by Part 4A of the Commerce Act. With reference to s2(1)(b) the Applicant submitted that the provision relates to energy charges rather than lines charges.
- 82 In respect of s2(1)(c) the Applicant submitted that the margin for external lines is unrelated to the separation function of the legislation.
- 83 The Applicant also submitted in respect of s2(1)(d) that the Westfield Group is only charging what the external network operator would charge on a stand alone basis. The Applicant stated that the Westfield Group is prepared to accept an exemption condition which allows other supply businesses access to the internal networks in its shopping centres.
- 84 With regard to the specific purposes under s2(2)(a)(i) and (ii), the Applicant submitted that s2(2)(a)(i) is intended to relate to competition in the generation and retail sectors rather than the lines sector and that in any event a high margin would incentivise tenants to bypass the Westfield Group's Installation Control Points (ICPs) at particular shopping centres. An ICP is a metering point that connects the internal and external networks. The Applicant informed the Commission that [
-]. Additionally the Applicant

submitted that the charging of a margin does not have any impact on relationships between lines and supply businesses which may otherwise not be at arms length, and therefore not contrary to s2(2)(b)(ii).

- 85 The Westfield Group's control and ownership of ICPs (and of the connected embedded networks) results in them being responsible for paying the external network service charge for the carriage of electricity on the local network to that point, which electricity is subsequently supplied to and consumed by tenants within a shopping centre. The cost of the external network service plus the margin charged by the Westfield Group is then recovered from tenants as part of the price of the electricity supplied to that tenant by the Westfield Group. The Commission considers that as these amounts are chargeable only as a result of the Westfield Group's ownership of the internal networks and ICPs they are therefore directly related to the ownership or operation by the Westfield Group of lines and connection assets as contemplated by s4(1)(b) of the EIR Act. The distinction made by the Applicant between internal and external lines charges is considered to be artificial in this case. Given the Westfield Group does not own, operate or convey electricity through the external lines the charges cannot be related to a service of that kind provided by the Westfield Group. The Commission notes that these charges are, as well, direct revenue of the Westfield Group's electricity supply business.
- 86 The Commission requested from the Applicant copies of actual leases between Westfield and a variety of its tenants which the Commission has reviewed and considered. The Applicant has subsequently confirmed that the clauses relating to electricity supply included in the provided contracts (specifically clause 8.10) are representative of the clauses contained in leases with other tenants. The Commission is of the view that, on proper construction, the leases provide no basis for the recovery either of a margin over and above the lines charge of the local network operator or of those line charges, except and only to the extent some of those costs are recoverable from liable tenants on account of the costs of common services. It appears that, as a matter of practice, the line charges and margin are recovered by being bundled with the energy supply charges which are recoverable under the lease.
- 87 Ultimately, it appears that the ability to recover line charges and the margin stems from the Westfield Group's ownership and operation of embedded networks and associated ICPs and its rights to require tenants to purchase electricity from the Westfield group under their leases. Therefore, it is the cross-involvement in lines and supply that enable the collection of the charges and margin.
- 88 In accordance with s81 of the EIR Act, the Commission may, in its discretion and upon the terms and conditions that it thinks fit grant an exemption from s17. The cross-involvement and collection of the external lines charges and margin is, in the view of the Commission, contrary to the stated purposes of the EIR Act under s2(1)(a) and 2(1)(b). Having determined that the external lines charges and margin is more accurately viewed as a revenue stream that stems from the Westfield Group's cross-involvement in electricity supply and electricity lines businesses the Commission is of the view that, subject to s2(1)(c), it is entitled to take the issue into consideration in determining whether or not to grant an exemption.
- 89 It is the Commission's view that the collection of a revenue stream over and above that which directly relates to the recovery of the cost involved to the landlord in the distribution of electricity to its tenants is contrary to the purposes of the EIR Act, particularly sections 2(1)(a), 2(1)(b), 2(2)(a)(i) and 2(2)(b).

- 90 The Commission considers that conditions are required to remove the potential for charging an inflated price for electricity distribution or supply by reason of an otherwise prohibited cross-involvement.
- 91 Accordingly, the Commission is of the view that an additional condition is required to limit the recovery of this revenue stream to the recovery of actual costs with respect to external lines charges from liable tenants in so far as those costs relate to the provision of common services and the relevant lease allows. The Commission is of the view, based on the information before it, this is the position under current leases. The additional condition is included for certainty in the case of current tenants and for future application should lease terms be altered. Additionally, the Commission considers that it is appropriate for the Westfield Group to provide tenants with a sufficient level of information to enable them to properly assess their electricity bill. Accordingly, a condition is included that requires separate unbundled disclosure by the Westfield Group to current and intending tenants of (i) the relevant energy charges, (ii) any recovery on account of actual line charges and the basis for such recovery, and (iii) any recovery on account of actual administration costs associated with lines charges and the basis for such recovery.
- 92 The Commission is also of the view that references to internal embedded wiring systems or networks should be extended to include points of connection to external distribution/transmission lines and metering equipment. This has been incorporated in the conditions as listed below.
- 93 The Commission is of the view that the granting of an exemption subject to the following conditions would significantly restrict the incentives or opportunities to inhibit competition in the electricity industry:
- (a) The Westfield Group will not charge tenants (or anyone else) for the use of the internal embedded wiring systems, points of connection to external distribution/transmission lines and metering equipment within its shopping centres.
 - (b) The Westfield Group will allow access to the internal embedded wiring systems, points of connection to external distribution/transmission lines and metering equipment within its shopping centres on reasonable terms and within a reasonable time to any electricity supply business to enable that electricity supply business to supply electricity to any tenant of the Westfield Group connected to such systems.
 - (c) The Westfield Group will not enforce any of its existing lease clauses which allow it to require tenants to obtain electricity from or through the Westfield Group in order that any tenant can obtain electricity from or through any alternative electricity supplier it so chooses.
 - (d) The Westfield Group will:
 - notify, within three months, those tenants who have lease clauses which allow the Westfield Group the option of supplying electricity to them that the Westfield Group will not enforce these clauses; and
 - notify any new tenants, after the date of this exemption, who have lease clauses which allow the Westfield Group the option of supplying electricity that the Westfield Group will not enforce these clauses or alternatively that

the Westfield Group will provide in the leases for those tenants that they can choose their own electricity supplier.

- (e) The Westfield Group, with each bill, will provide consumption and billing information to its tenants to whom they supply electricity and will use their best endeavours to provide such reasonable information that any tenant being supplied electricity by the Westfield Group may request, to enable tenants to assess competitive options available to them for the supply of electricity.
- (f) The Westfield Group, with each bill, will provide consumption and billing information to tenants in a manner that separates and identifies the relevant energy charges, any recovery on account of actual line charges and the basis for such recovery, and any recovery on account of actual administration costs associated with lines charges and the basis for such recovery.
- (g) In the event of the Westfield Group exiting or re-entering the electricity supply business the Westfield Group will give the Commission written notice of that fact.
- (h) The Westfield Group will not recover any revenue, margin or other amount in respect of line function or other services provided by external network operators other than an apportionment of their actual cost to the Westfield Group where and to the extent an amount on account of that cost is recoverable from a tenant under its lease as an operational cost and actual costs of administration related to line charges to the extent recoverable under the lease.

94 Accordingly, the Commission considers that, given these conditions, 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 the Westfield Group with opportunities to inhibit competition in the national electricity retail market.

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?

95 The Westfield Group has generators at certain shopping centres there in case of power outages, but these do not generate more than 2.5GWh per annum in total and therefore the Westfield Group is not considered to be involved in generation activities for the purposes of the EIR Act. 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?

96 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 the Westfield Group'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.

- 97 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 the conditions referenced in paragraph 93 being implemented and, in the case of any future property investment and management activities undertaken by the Westfield Group, the Commission being kept informed by the Westfield Group of any comparable activities for which the Westfield Group 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

- 98 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.

- 99 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:
 - Chartwell Shopping Centre Limited;
 - Downtown Shopping Centre Limited;
 - Glenfield Mall Limited;
 - Manukau City Centre Limited;
 - The Pakuranga Plaza Limited;
 - Queensgate Centre Limited;
 - Riccarton Shopping Centre (1997) Limited;
 - Shore City Centre (1993) Limited;
 - St Lukes Square (1993) Limited;
 - WestCity Shopping Centre Limited;
 - Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited;
 - St Lukes Group No. 2 Limited;
 - St Lukes Group Limited;
 - St Lukes Group Holding Limited;
 - Westfield Trust (NZ) Limited;
 - Westfield (New Zealand) Limited;
 - Abyssinian Holdings Limited; and
 - Westfield Alliances (NZ) Pty Limited;
- any business or involvement or interest in relation only to any future property investment and management activities that the Westfield Group 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 the Westfield Group 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).

100 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.

101 In making its decision the Commission notes that the facts revealed in the Application are particular to the Westfield Group’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 Commission, pursuant to section 81 of the Electricity Industry Reform Act 1998 (EIR Act), exempts the following entities (the Westfield Group) 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):

- Chartwell Shopping Centre Limited;
- Downtown Shopping Centre Limited;
- Glenfield Mall Limited;
- Manukau City Centre Limited;
- The Pakuranga Plaza Limited;
- Queensgate Centre Limited;
- Riccarton Shopping Centre (1997) Limited;
- Shore City Centre (1993) Limited;
- St Lukes Square (1993) Limited;
- WestCity Shopping Centre Limited;
- Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited;
- St Lukes Group No. 2 Limited;
- St Lukes Group Limited;
- St Lukes Group Holding Limited;
- Westfield Trust (NZ) Limited;
- Westfield (New Zealand) Limited;
- Abyssinian Holdings Limited; and
- Westfield Alliances (NZ) Pty 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 the Westfield Group 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 Westfield Group and persons who acquire more than 10% of the securities in the Westfield Group subject to the following terms and conditions:

- (a) The Westfield Group will not charge tenants (or anyone else) for the use of the internal embedded wiring systems, points of connection to external distribution/transmission lines and metering equipment within its shopping centres.
- (b) The Westfield Group will allow access to the internal embedded wiring systems, points of connection to external distribution/transmission lines and metering equipment within its shopping centres on reasonable terms and within a reasonable time to any electricity supply business to enable that electricity supply business to supply electricity to any tenant of the Westfield Group connected to such systems.

- (c) The Westfield Group will not enforce any of its existing lease clauses which allow it to require tenants to obtain electricity from or through the Westfield Group in order that any tenant can obtain electricity from or through any alternative electricity supplier it so chooses.
- (d) The Westfield Group will:
 - notify, within three months, those tenants who have lease clauses which allow the Westfield Group the option of supplying electricity to them that the Westfield Group will not enforce these clauses; and
 - notify any new tenants, after the date of this exemption, who have lease clauses which allow the Westfield Group the option of supplying electricity that the Westfield Group will not enforce these clauses or alternatively that the Westfield Group will provide in the leases for those tenants that they can choose their own electricity supplier.
- (e) The Westfield Group will provide, with each bill, consumption and billing information to its tenants to whom they supply electricity and will use their best endeavours to provide such reasonable information that any tenant being supplied electricity by the Westfield Group may request, to enable tenants to assess competitive options available to them for the supply of electricity.
- (f) The Westfield Group will provide, with each bill, consumption and billing information to tenants in a manner that separates and identifies the relevant energy charges, any recovery on account of actual line charges and the basis for such recovery, and any recovery on account of actual administration costs associated with lines charges and the basis for such recovery.
- (g) In the event of the Westfield Group exiting or re-entering the electricity supply business the Westfield Group will give the Commission written notice of that fact.
- (h) The Westfield Group will not recover any revenue, margin or other amount in respect of line function or other services provided by external network operators other than an apportionment of their actual cost to the Westfield Group where and to the extent an amount on account of that cost is recoverable from a tenant under its lease as an operational cost and actual costs of administration related to line charges to the extent recoverable under the lease.

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 the Westfield Group 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 the Westfield Group 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 the Westfield Group.

- (b) That the Westfield Group informs the Commission of the details of any future property investment and/or management activity (including company purchase or formation), 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 the Westfield Group and/or any other persons are likely to rely on this exemption.

The exemption takes effect from 14 November 2004, which will be the date one month from the date that the Notice of Exemption is published in the *Gazette*.

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

Dated this 29th day of September 2004

Paula Rebstock
Chair
Commerce Commission

APPENDIX 1

WESTFIELD COMPANIES INVOLVED IN THE EXEMPTION APPLICATION

Company	Shopping Centre
Chartwell Shopping Centre Limited	Westfield Chartwell
Downtown Shopping Centre Limited	Downtown Shopping Centre
Glenfield Mall Limited	Westfield Glenfield
Manukau City Centre Limited	Westfield Manukau
The Pakuranga Plaza Limited	Westfield Pakuranga
Queensgate Centre Limited	Westfield Queensgate
Riccarton Shopping Centre (1997) Limited	Westfield Riccarton
Shore City Centre (1993) Limited	Westfield Shore City
St Lukes Square (1993) Limited	Westfield St Lukes
WestCity Shopping Centre Limited	Westfield WestCity
Albany Shopping Centre Limited and Albany Shopping Centre No. 2 Limited	Albany Landholding
St Lukes Group No. 2 Limited	Newmarket Landholding Two Double Seven Shopping Centre
Westfield Trust (NZ) Limited	(The parent company for the Shopping Centre entities)
Westfield (New Zealand) Limited	(The Property Manager)
Abyssinian Holdings Limited	(Owner of the internal lines networks at the Shopping Centres)
Westfield Alliances (NZ) Pty Limited	(Depending on the outcome of the exemption application, control of Abyssinian Holdings Limited may be vested in this company in future and this company may enter into electricity purchase contracts)