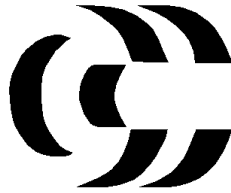


# PUBLIC VERSION



ISSN NO. 0114-2720  
J3722

## COMMERCE COMMISSION

### Decision No. 375

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

#### **COLONIAL FIRST STATE PROPERTY (NZ) LIMITED**

**The Commission:** Dr K M Brown

**Commission Staff:** M E Dingle  
A Mladenovic

**Summary of Application:** Colonial First State Property (NZ) Limited, for itself and on behalf of certain other persons which, in relation to certain property investment and management activities, are, or could be in future, 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, seeks an exemption, under section 81 of the EIR Act, from the application of certain sections of the EIR Act.

**Determination:** The Commission, under section 81 of the EIR Act, exempts Colonial First State Property (NZ) Limited and certain other persons as stated 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:** 28 October 1999.

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

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## INTRODUCTION

- 1 On 4 October 1999 the Commerce Commission (“the Commission”) received an application under section 81 of the Electricity Industry Reform Act 1998 (“the EIR Act”) made by Colonial First State Property (NZ) Limited (“CFSP”) (“the Application”). The Application was made both in respect of CFSP and on behalf of the Colonial First State Property Trust (“the CFSP Trust”) and Colonial First State Property Durham St Limited (“CFSP Durham St”).
- 2 In the Application CFSP seeks an exemption from the application of section 17 of the EIR Act in respect of current “cross-involvement” (as that term is defined in the EIR Act) arising in relation to certain property investment and management activities.
- 3 On 15 October 1999 the Commission was notified of an amendment to the Application. The effect of the amendment is to extend the Application such that CFSP also seeks an exemption from the application of sections 17, 18 and 30 of the EIR Act in relation to certain future property investment and management activities (and which without the exemption would be in breach of any of those sections).
- 4 Section 81 of the EIR Act specifies the Commission’s powers to exempt any businesses, involvements or interests from the application of the EIR Act, or exempt any persons from compliance with any provisions of any regulations made under the EIR Act.

## THE ENTITIES

### Colonial First State Property (NZ) Limited

- 5 CFSP is part of the Colonial Group<sup>1</sup>. The Colonial Group is a major international financial services group. It provides a broad range of services including banking, retail insurance, investment and superannuation, funds management and funds administration.
- 6 As part of its New Zealand operations the Colonial Group carries on a property investment business. That business is conducted in part through the CFSP Trust.
- 7 CFSP is the manager of the CFSP Trust and manages the properties in the CFSP Trust. This includes the provision of property management and accounting and financial services.
- 8 CFSP is wholly-owned by Colonial First State Investments (NZ) Limited (“Colonial First State Investments”) which is in turn wholly-owned by Colonial Holding Co (NZ) Limited (“Colonial Holding Co”). Both Colonial First State Investments and Colonial Holding Co are New Zealand companies. Colonial Holding Co is wholly-owned by Colonial Tasman Pty Limited, which is an Australian company.

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<sup>1</sup> The Colonial Group refers to Colonial Limited and its controlled entities. Colonial Limited is listed on the stock exchanges of Australia and New Zealand.

## The Colonial First State Property Trust

- 9 The CFSP Trust is a property owning unit trust designed to provide a return to investors through owning and renting properties. The CFSP Trust is listed on the New Zealand Stock Exchange. Substantial beneficiaries or unitholders of the CFSP Trust are two companies in the Colonial Group: Colonial Life (NZ) Limited (“Colonial Life”) (50.99% unitholder) and the New Zealand branch of The Colonial Mutual Life Assurance Society Limited (“CMLA”<sup>2</sup>) (12.38% unitholder). Colonial Life is wholly-owned by Colonial Holding Co No. 2 (NZ) Limited (“Colonial Holding Co No. 2”). The majority shareholder of Colonial Holding Co No. 2 is Colonial Holding Co. CMLA has a negligible shareholding in Colonial Holding Co No. 2.
- 10 The remaining unitholders of the CFSP Trust are members of the public. Each of the remaining unitholders has less than 10% beneficial interest.
- 11 Perpetual Trust Limited (“Perpetual”) is the trustee of the CFSP Trust. Perpetual, in its capacity as trustee, owns the assets of the CFSP Trust. This includes ownership of the companies within the CFSP Trust which have each been specifically established to own a single investment property.
- 12 As noted above, CFSPL is the manager of the CFSP Trust and manages the properties in the CFSP Trust.

## SUPPLY OF ELECTRICITY

### Supply of Electricity to Tenants

- 13 CFSPL, as manager of the properties, is responsible for supplying electricity to three properties owned within the CFSP Trust by single asset companies. Table 1 shows the quantities of electricity supplied per annum by the companies to tenants of properties owned by them. With the exception of Windsor Court, the quantities relate to electricity consumed directly by the tenants and do not include electricity supplied to common building services. In the case of Windsor Court, the quantity of electricity supplied to common building services is believed to be relatively small and has no effect on the Commission’s consideration of the Application.

*Table 1: Electricity Supplied Per Annum to Tenants of Properties within the CFSP Trust*

<b>Owner of Property</b>	<b>Property</b>	<b>GWh (Per Annum)</b>
CFSP Durham St	South City Centre, 555 Colombo Street, Christchurch	[ ]
Colonial First State Property Aggregated Limited (“CFSP Aggregated”)	Windsor Court, 128 Parnell Road, Auckland	[ ]
Colonial First State Property Nelson Street Limited (“CFSP Nelson Street”)	IBM Building, 5 Wyndam Street, Auckland	[ ]

<sup>2</sup> In this decision reference to “CMLA” means specifically the New Zealand branch of The Colonial Mutual Life Assurance Society Limited. CMLA is a registered company in New Zealand. The Colonial Mutual Life Assurance Society Limited is an Australian company whose parent company is Colonial Limited.

14 The only tenants who are collectively supplied more than 2.5 GWh of electricity per annum<sup>3</sup> are those occupying the South City Centre. CFSPL employs Mantech (NZ) Limited (“Mantech”) to act as its property manager of the South City Centre. In respect of the supply of electricity to the South City Centre, Mantech, as CFSPL’s agent, has the following arrangement with the electricity retailer, Southpower:

- the electricity accounts are in Mantech’s name;
- Southpower provides Mantech with an invoice for total electricity used at the South City Centre (including supply to tenants);
- Mantech pays Southpower by direct debit;
- Mantech then arranges (through a contractor) for the electricity meters of individual tenants to be read;
- Mantech’s contractor then produces invoices for tenants reflecting individual electricity consumption, plus an apportionment of common area cost and the contractor’s fee;
- the invoices are then distributed to tenants for payment. A late fee of 10% is charged for payments not made within 30 days.

15 In addition to the supply of electricity to tenants of properties within the CFSP Trust by CFSPL (through its agent, Mantech), two further companies within the Colonial Group own properties in New Zealand and supply electricity to tenants of those properties. They are Colonial Life and CMLA. Table 2 sets out the quantities of electricity supplied per annum by Colonial Life and CMLA to tenants of their properties and to common building services:

*Table 2: Electricity Supplied Per Annum to Tenants of Properties Owned by Colonial Life and CMLA*

<b>Owner of Property</b>	<b>Property</b>	<b>GWh (Per Annum)</b>
Colonial Life	South British Building, 326 Lambton Quay, Wellington <sup>4</sup>	[ ] <sup>5</sup>
CMLA	Rossmore House, Molesworth Street, Wellington	[ ]

16 As can be seen, the quantity of electricity supplied to the tenants of each property in Table 2 is in total under 2.5 GWh per annum and, therefore, below the threshold stated in the EIR Act.

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

17 CFSPL, Colonial Life and CMLA supply electricity to common building services provided to the properties shown in Tables 1 and 2, such as lighting common areas and running central air conditioning systems. The cost of this electricity, along with general running expenditure (such as cleaning common areas), is recovered from the tenants as part of the monthly operating expenditure charge.

<sup>3</sup> The quantity of 2.5 GWh per annum is the statutory threshold used when assessing the applications of sections 4 and 5 of the EIR Act.

<sup>4</sup> The South British Building has been unconditionally sold with settlement to take effect on 21 October 1999.

<sup>5</sup> The electricity consumption figure for the South British Building is an approximation based on actual March/April figures. No adjustment has been made for winter because gas is used for heating.

## **EMBEDDED ELECTRICAL WIRING SYSTEMS**

- 18 Electricity supplied to properties owned by CFSP Durham St, CFSP Aggregated, CFSP Nelson Street, Colonial Life and CMLA, which are shown in Tables 1 and 2, is conveyed by means of the existing embedded electrical wiring systems within the various buildings.

## **THE EXEMPTION SOUGHT BY CFSPL**

- 19 In the Application CFSPL seeks an exemption from the application of section 17 of the EIR Act in respect of current “cross-involvement” (as that term is defined in the EIR Act) in relation to the South City Centre. This is on the grounds that the quantity of electricity supplied to the tenants of the South City Centre by CFSPL, as the manager of the South City Centre for CFSP Durham St, exceeds in total 2.5 GWh per annum.
- 20 The quantities of electricity currently supplied by CFSPL to Windsor Court (on behalf of CFSP Aggregated) and to IBM Building (on behalf of CFSP Nelson Street), Colonial Life to South British Building and CMLA to Rossmore House are in each case in total less than 2.5 GWh per annum. Accordingly, CFSPL considers that an exemption from section 17 of the EIR Act is not necessary in respect of these properties.
- 21 In addition to current cross-involvement in terms of the EIR Act, CFSPL seeks an exemption from the application of sections 17, 18 and 30 of the EIR Act in respect of any future property investment and/or management activity it might undertake or that might be undertaken by any company or entity related to CFSPL or otherwise part of the Colonial Group (and which without the exemption would be in breach of any of those sections).
- 22 Each time a new property owning company or property is acquired there would be an increase in an involvement in an electricity lines business in terms of the EIR Act. Section 30 of the EIR Act prohibits a person from increasing its involvement in an electricity business, which includes an electricity lines business and electricity supply business. In addition, in some circumstances, by acquiring a new property owning company and/or property there may be a breach of section 18 of the EIR Act (i.e., 20% aggregate cross-ownership prohibition). Further, if the newly acquired property owning company sells more than 2.5 GWh of electricity per annum, there will be an increase in involvement in an electricity supply business in terms of the EIR Act.
- 23 CFSPL’s purpose in seeking an exemption in relation to any future property investments is to have the relevant entities avoid having to seek an exemption each time a new property owning company and/or property is purchased, thereby saving compliance costs and potential transaction delays.
- 24 CFSPL has not sought an exemption from the application of section 17 of the EIR Act in respect of electricity supplied to tenants for the provision of common building services and charged as an operating expense. In accordance with the Commission’s decision in respect of Trans Tasman Properties Limited (“the Trans Tasman Properties decision”)<sup>6</sup>, CFSPL does not consider that the purchase and supply of electricity to run common

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<sup>6</sup> Commerce Commission, Decision No. 351A, *Trans Tasman Properties Limited*, 6 May 1999.

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

- 25 If the Commission is prepared to grant the exemption sought in respect of the South City Centre, CFSPL accepts, for itself and on behalf of the CFSP Trust, that it should be on the following terms and conditions (“CFSPL’s conditions”):
- CFSPL will not introduce a lines charge for use of, or related to, an electricity lines business (being the embedded wiring system) in relation to the supply of electricity to tenants of the South City Centre;
  - CFSPL will not prevent access, on reasonable terms, to its embedded wiring systems in the South City Centre to any electricity supply business wanting to supply tenants of the South City Centre;
  - CFSPL will provide all tenants of the South City Centre with sufficient information to enable them to assess competitive electricity supply options;
  - if CFSPL materially changes the contracts or arrangements with the tenants of the South City Centre in relation to the supply or conveyance of electricity, it will notify the Commission.
- 26 CFSPL also agrees that if an exemption is granted by the Commission in respect of potential future property investment and management activities, the undertakings accepted in relation to the South City Centre would apply to any relevant properties. In addition, CFSPL would undertake to advise the Commission of the details of any future property investment and/or management activity that is likely to breach the EIR Act and for which CFSPL or any other person would be likely to rely on the exemption, within 20 working days after undertaking the relevant activity.

## COMMISSION PROCEDURES

- 27 For the purpose of considering the Application, the Commission, pursuant to section 58 of the EIR Act, which applies section 105 of the Commerce Act 1986 to the EIR Act, has delegated its powers under section 81 of the EIR Act to Dr K M Brown.
- 28 The Commission’s decision is based on an investigation conducted by its staff and their subsequent advice to the Commission.

## INVOLVEMENTS AND PROHIBITED CROSS-INVOLVEMENTS

- 29 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.”

- 30 It is necessary to consider in relation to the Application whether any persons are currently “involved” (as that term is 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).

31 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.”

32 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.”

33 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;
  - (iii) Generates electricity in New Zealand;
  - (iv) 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.”



34 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) Owning or operating, directly or indirectly, a generator referred to in any of paragraphs (b) to (d) or subsection (3) or any other core generation assets used in connection with those generators.”

35 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.”

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

36 The Commission considered the application of the EIR Act in relation to investment properties in the Trans Tasman Properties decision. As a result of that decision, 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.

37 Accordingly, the Commission concludes in respect of the Application that the following entities are electricity lines businesses under section 4 of the EIR Act:

- (a) CFSP Durham St, CFSP Aggregated, CFSP Nelson Street, Colonial Life and CMLA, because they:
  - own, directly, lines that convey electricity in New Zealand, being the embedded electrical wiring systems within the buildings they own shown in Tables 1 and 2 (section 4(1)(a) and(b)); and
  - are not exempt from the meaning of “electricity lines business” by section 4(2)(a) because they together convey more than 2.5 GWh of electricity per annum (the definition of “associates” in the EIR Act

requires the electricity conveyed by lines by CFSP Durham St, CFSP Aggregated, CFSP Nelson Street, Colonial Life and CMLA to be aggregated); and

- are not exempt from the meaning of “electricity lines business” through any of sections 4(2)(b) to (g).
- (b) The CFSP Trust (and Perpetual, as the trustee of the CFSP Trust<sup>7</sup>) because they:
- own, indirectly, through CFSP Durham St, CFSP Aggregated and CFSP Nelson Street, lines that convey electricity in New Zealand (section 4(1)(a) and (b)); and
  - are not exempt from the meaning of “electricity lines business” through section 4(2).
- (c) Colonial Holding Co No. 2 because it:
- owns, indirectly, through Colonial Life, lines that convey electricity in New Zealand (section 4(1)(a) and (b)); and
  - is not exempt from the meaning of “electricity lines business” through section 4(2).
- (d) CFSPL because, as the manager and agent of CFSP Durham St, CFSP Aggregated and CFSP Nelson Street, it:
- operates lines that convey electricity in New Zealand, being the embedded electrical wiring systems within the buildings owned by CFSP Durham St, CFSP Aggregated and CFSP Nelson Street shown in Tables 1 and 2 (section 4(1)(a) and (b)); and
  - is not exempt from the meaning of “electricity lines business” through section 4(2).

The Commission concludes that the business of CFSPL in relation to the properties owned by CFSP Durham St, CFSP Aggregated and CFSP Nelson Street is such that CFSPL operates (in terms of section 4(1)(b) of the EIR Act) the embedded electrical wiring systems within those properties. In the Commission’s view, CFSPL provides more than maintenance and related services in respect of the embedded electrical wiring systems.

38 The Commission also concludes that the above electricity lines businesses are involved for the purposes of section 7 of the EIR Act because they:

- carry on their electricity lines businesses, either alone or together with their associates and either on their own or another’s behalf (section 7(1)(a));
- exceed the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in their electricity lines businesses (in the case of the CFSP

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<sup>7</sup> Section 3 of the EIR Act defines “person” as including the trustees of a trust acting in that capacity.

Trust, Perpetual, as the trustee of the CFSP Trust, and Colonial Holding Co No. 2 only) (section 7(1)(b));

- have material influence over their electricity lines businesses (in the case of the CFSP Trust, Perpetual, as the trustee of the CFSP Trust, CFSPL and Colonial Holding Co No. 2 only) (section 7(1)(c)).

39 In addition, the Commission concludes that the following entities are involved under section 7 of the EIR Act in electricity lines businesses identified above:

- (a) The beneficiaries of the CFSP Trust which exceed the 10% threshold in section 8 of the EIR Act (section 7(1)(b)) as follows:
  - (i) Colonial Life as 50.99% unitholder of the CFSP Trust.
  - (ii) CMLA as 12.38% unitholder of the CFSP Trust;
- (b) Colonial First State Investments because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) and, under section 11(2) of the EIR Act, has material influence over CFSPL (section 7(1)(c));
- (c) Colonial Holding Co because, under section 11(2) of the EIR Act, it has material influence over Colonial First State Investments and Colonial Holding Co No. 2 (section 7(1)(c)).

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

40 The Commission concludes in respect of the Application that the following entities are electricity supply businesses under section 5 of the EIR Act:

- (a) CFSP Durham St because, through its manager and agent CFSPL, it:
  - (i) sells electricity in New Zealand (section 5(1)(a)(i)).
  - (ii) owns, directly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)).
  - (iii) owns, directly, the benefit of a contract to sell electricity (section 5(1)(c)(ii)).
  - (iv) is not exempt from the meaning of “electricity supply business” through section 5(2);
- (b) The CFSP Trust (and Perpetual, as the trustee of the CFSP Trust) because they own, indirectly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)) and the benefit of a contract to sell electricity (section 5(1)(c)(ii));
- (c) CFSPL because it operates, directly, the core assets of an electricity retail business being the customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)) and the benefits of contracts to sell electricity (section 5(1)(c)(ii)).

- 41 The Commission agrees with CFSPL's analysis in the Application and concludes that CFSP Aggregated, CFSP Nelson Street, Colonial Life and CMLA are not electricity supply businesses in terms of section 5 of the EIR Act. They:
- sell electricity in New Zealand (section (5)(1)(a)(i));
  - own, directly, customer data bases relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i));
  - own, directly, the benefits of contracts to sell electricity (section 5(1)(c)(ii));
  - are exempt from the meaning of "electricity supply business" because they individually sell less than 2.5 GWh of electricity per annum (section 5(2)(a)).
- 42 The electricity supply businesses identified above are involved for the purposes of section 7 of the EIR Act because they:
- carry on their electricity supply businesses, either alone or together with their associates and either on their own or another's behalf (section 7(1)(a));
  - exceed the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights in their electricity supply businesses (in the case of the CFSP Trust and Perpetual, as the trustee of the CFSP Trust, only) (section 7(1)(b));
  - have material influence over their electricity supply businesses (in the case of the CFSP Trust, Perpetual, as the trustee of the CFSP Trust, and CFSPL only) (section 7(1)(c)).
- 43 The following entities are also involved in the above electricity supply businesses:
- (a) The beneficiaries of the CFSP Trust which exceed the 10% threshold in section 8 of the EIR Act (section 7(1)(b)) as follows:
    - (i) Colonial Life as 50.99% unitholder of the CFSP Trust.
    - (ii) CMLA as 12.38% unitholder of the CFSP Trust;
  - (b) Mantech because it assists CFSPL with the management of properties by, amongst other things, administering the electricity supply and, therefore, carries on an electricity supply business on behalf of CFSPL (section 7(1)(a));
  - (c) Colonial First State Investments because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) and, under section 11(2) of the EIR Act, has material influence over CFSPL (section 7(1)(c));
  - (d) Colonial Holding Co No. 2 because it exceeds the 10% threshold in section 8 of the EIR Act in terms of control and equity return rights (section 7(1)(b)) and, under section 11(2) of the EIR Act, has material influence over Colonial Life (section 7(1)(c));
  - (e) Colonial Holding Co because, under section 11(2) of the EIR Act, it has material influence over Colonial First State Investments and Colonial Holding Co No. 2 (section 7(1)(c)).

- 44 The supply of electricity for the purpose of providing common building services does not constitute, in the Commission’s view, an electricity supply business for the purposes of the EIR Act. In this respect, the Commission stated in Decision No. 351<sup>8</sup>, at paragraph 11:

“The purchase of such electricity by TTP 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. The recovery of the cost of this electricity by TTP does not, in the Commission’s view, represent selling electricity but is instead the recovery of the costs of various services provided by TTP which are integral to managing and operating its rental properties, and for which, in some instances, electricity is a necessary input.”

### Prohibited Cross-involvements

- 45 Table 3 summarises the Commission’s preceding conclusions as to whether or not, in respect of the Application, the entities assessed above:

- are electricity lines businesses under sections 4 of the EIR Act; and/or
- are electricity supply businesses under section 5 of the EIR Act; and
- are involved in an electricity business under section 7 of the EIR Act; and
- have prohibited cross-involvements under section 17 of the EIR Act.

*Table 3: Summary of Prohibited Cross-involvements*

Entity	Electricity Lines Business?	Involved (Lines)?	Electricity Supply Business?	Involved (Supply)?	Prohibited Cross-involvement?
CFSP Durham St	✓	✓	✓	✓	✓
CFSP Aggregated	✓	✓	x	x	x
CFSP Nelson Street	✓	✓	x	x	x
Colonial Life	✓	✓	x	✓	✓
CMLA	✓	✓	x	✓	✓
The CFSP Trust	✓	✓	✓	✓	✓
Perpetual	✓	✓	✓	✓	✓
Colonial Holding Co No. 2	✓	✓	x	✓	✓
CFSP	✓	✓	✓	✓	✓
Colonial First State Investments	x	✓	x	✓	✓
Colonial Holding Co	x	✓	x	✓	✓
Mantech	x	x	x	✓	x

- 46 Accordingly, the Commission is required to consider an exemption from the application of section 17 of the EIR Act for the following entities with prohibited cross-involvement in relation to the South City Centre (“the cross-involved entities”):

- CFSP Durham St
- Colonial Life (as a beneficiary of the CFSP Trust and in respect of its resulting “involvement” (as that term is defined in the EIR Act) in the electricity businesses of CFSP Durham St and the CFSP Trust)

<sup>8</sup> Commerce Commission, Decision No. 351, *Trans Tasman Properties Ltd*, 1 April 1999. This decision related to a limited time exemption from section 17 of the EIR Act pending the Commission’s substantive determination (Decision No. 351A, referred to in footnote 6).

- CMLA (as a beneficiary of the CFSP Trust and in respect of its resulting “involvement” in the electricity businesses of CFSP Durham St and the CFSP Trust)
- The CFSP Trust
- Perpetual (only in respect of its “involvement” in the electricity businesses of CFSP Durham St and the CFSP Trust)
- Colonial Holding Co No. 2
- CFSPL
- Colonial First State Investments
- Colonial Holding Co

### **CRITERIA USED BY THE COMMISSION FOR EXEMPTION APPLICATIONS**

47 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 has set out its role and processes in Practice Note No. 3<sup>9</sup>.

48 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 Act. The Commission is likely to grant an exemption in respect of a business or involvement or interest only where doing so:

- (a) would not result in certain involvements in electricity lines businesses and electricity supply businesses which may create incentives or opportunities:
  - (i) to inhibit competition in the electricity industry; or
  - (ii) to cross-subsidise generation activities from electricity lines businesses; and
- (b) would not result in relationships between electricity lines businesses and electricity supply businesses which are not at arms length.

In determining exemptions, the Commission will also have regard to the overall purpose of the EIR Act as set out in section 2(1) of the Act. That is, the purpose of the EIR Act is to reform the electricity industry to better ensure that:

- (a) costs and prices in the electricity industry are subject to sustained downward pressure; and
  - (b) the benefits of efficient electricity pricing flow through to all classes of consumers
- by –
- (c) effectively separating electricity distribution from generation and retail; and
  - (d) promoting effective competition in electricity generation and retail.”<sup>10</sup>

49 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

<sup>9</sup> Practice Note No. 3, *Electricity Industry Reform Act 1998 Commission’s Role and Processes*, September 1998 (Revised August 1999).

<sup>10</sup> *Ibid.* p. 12.

these limits and requirements is, other than in exceptional circumstances,<sup>11</sup> expected.”<sup>12</sup>

50 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 Act:

- Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to inhibit competition in the electricity industry?
- Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to cross-subsidise generation activities from electricity lines businesses?
- Would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between an electricity lines business and an electricity supply business which is not at arms length?

In relation to these questions, the Commission will consider factors such as:

- The relevant market(s)<sup>13</sup> within the electricity industry;
- The nature of any incentives or opportunities created;
- The temporal nature of any incentives or opportunities created;
- The nature of any relationship which is not at arms length; and
- The temporal nature of any relationship which is not at arms length.”<sup>14</sup>

## **RELEVANT MARKET**

51 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.<sup>15</sup>

## **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?

52 The question to consider here is whether granting an exemption under section 81 of the EIR Act to the cross-involved entities and in respect of any future property investment and management activities undertaken by the Colonial Group in New Zealand would create incentives or opportunities to inhibit competition in the electricity industry.

<sup>11</sup> “For example, of the types provided for in section 19 of the EIR Act.”

<sup>12</sup> Ibid. p. 13.

<sup>13</sup> “Defined using the same process as used for market definitions in respect of Commerce Act matters.”

<sup>14</sup> Ibid. p. 13.

<sup>15</sup> 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 relevant to the Application.

53 The recent electricity sector reform through the EIR Act has necessitated the separation of electricity distribution functions (lines) and electricity retailing and generation functions (supply) to enhance competition and choice in respect of the supply functions. 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;
- delays in permitting electricity retailers to have access to lines through use-of-system contractual arrangements.

54 CFSPL has stated in the Application that, through its property manager Mantech (acting as agent for CFSPL), it does not impose any line charges for conveying electricity across the embedded electrical wiring system in the South City Centre. CFSPL has further stated in the Application that if granted an exemption under section 81 of the EIR Act it will, in accordance with CFSPL's conditions, continue to:

- provide line services at no charge at the South City Centre;
- allow access by alternative electricity suppliers to tenants of the South City Centre; and
- provide those tenants with relevant electricity usage and billing information to enable them to make an informed choice between electricity suppliers.

CFSPL contends that, therefore, its cross-involvement in terms of the EIR Act will not provide it with incentives or opportunities to inhibit competition in the electricity retail market. CFSPL also contends that if the Commission does not grant an exemption the tenants of the South City Centre will likely be disadvantaged through being unable to take advantage of the bulk discount that CFSPL receives in respect of its electricity purchases.

55 The Commission concurs with CFSPL that the terms and conditions proposed by CFSPL would restrict any opportunities to defeat the purposes of the EIR Act by allowing the cross-involved entities to remain cross-involved. Accordingly, the Commission considers that given appropriate terms and conditions, the granting of an exemption from the application of section 17 of the EIR Act to the cross-involved entities in respect of the South City Centre would not provide the cross-involved entities with an opportunity to inhibit competition in the national electricity retail market.

56 In addition to current cross-involvement by the cross-involved entities (in respect of the South City Centre), CFSPL now seeks an exemption from the application of certain sections of the EIR Act for future property investment and/or management activities it might undertake or that might be undertaken in New Zealand by any company or entity related to CFSPL or otherwise part of the Colonial Group (and which without the exemption would be in breach of the EIR Act).

57 In respect of any future property investments, the relevant entities could be at risk under the following sections of the EIR Act:



- section 30 which puts a ban on 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 aggregate involvements of more than 20% by persons in either an electricity lines business or electricity supply business where those persons are involved under the EIR Act in the other type of business; and
- section 17 because if a newly acquired property owning company sells more than 2.5 GWh of electricity per annum, there would be an increased involvement in an electricity supply business.

58 If the Commission decides to grant the exemption sought by CFSPL in respect of future property investment and management activities, CFSPL accepts that the exemption should include the requirement that CFSPL's conditions (as proposed by CFSPL for the cross-involved entities) be adopted in respect of those activities. In addition to accepting CFSPL's conditions, CFSPL undertakes to advise the Commission of the details of any future property investment and/or management activity that is likely to breach the EIR Act and for which CFSPL or any other person would be likely to rely on the Commission's exemption, within 20 working days after undertaking the relevant activity.

59 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 might be undertaken in New Zealand by or on behalf of CFSPL or any company or entity related to CFSPL or otherwise part of the Colonial Group will not provide any opportunities to inhibit competition in the national electricity retail market, so long as:

- terms and conditions are adopted; and
- the Commission is informed of the details of any future property investment and/or management activity that is likely to breach the EIR Act and for which there is reliance upon this exemption from the Commission.

### **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?

60 None of the cross-involved entities or the property investment activities in New Zealand undertaken by or on behalf of the Colonial Group is involved in electricity generation. Accordingly, this criterion is not relevant to the Commission's analysis in this decision.

## A Relationship Not at Arms Length

Would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between an electricity lines business and an electricity supply business which is not at arms length?

- 61 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-involvement in terms of the EIR Act which might arise as a result of future property investment and/or management activities, the Commission would be allowing relationships between electricity lines businesses and electricity supply businesses to not be at arms length under the EIR Act.
- 62 However, the Commission considers that the potential effects of the relationships not being at arms length would be tempered if any exemption from the EIR Act was subject to terms and conditions being implemented including, in the case of any future property investment and/or management activities, the Commission being kept informed of any comparable activities for which there is reliance on this 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

- 63 The Application passes two of the three criteria used by the Commission to decide upon exemptions from the EIR Act, on the basis that certain terms and conditions are met. The third criterion is not applicable.
- 64 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 in respect of the South City Centre; and
  - any business or involvement or interest in relation only to any future property investment and management activities that might be undertaken in New Zealand by or on behalf of CFSPL or any company or entity related to CFSPL or otherwise part of the Colonial Group 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.
- 65 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 which follows.
- 66 In making its decision the Commission notes that the facts revealed in the Application are particular to the situation described in the Application. The Commission also notes that section 81(5) of the EIR Act provides that the Commission may vary or revoke any exemption at any time.

## NOTICE OF EXEMPTION

The Notice of Exemption concerns an application made by Colonial First State Property (NZ) Limited under section 81 of the Electricity Industry Reform Act 1998 (“the EIR Act”) and received by the Commerce Commission (“the Commission”) on 4 October 1999 (“the Application”), together with an amendment to the Application received by the Commission on 15 October 1999.

The Commission, under section 81 of the EIR Act, exempts the following entities (“the cross-involved entities”) 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) in relation to the South City Centre situated at 555 Colombo Street, Christchurch:

- Colonial First State Property Durham St Limited
- Colonial Life (NZ) Limited (as a beneficiary of the Colonial First State Property Trust and in respect of its resulting “involvement” (as that term is defined in the EIR Act) in the electricity businesses of Colonial First State Property Durham St Limited and the Colonial First State Property Trust)
- The New Zealand branch of The Colonial Mutual Life Assurance Society Limited (being a registered company in New Zealand) (as a beneficiary of the Colonial First State Property Trust and in respect of its resulting “involvement” in the electricity businesses of Colonial First State Property Durham St Limited and the Colonial First State Property Trust)
- The Colonial First State Property Trust
- Perpetual Trust Limited (only in respect of its “involvement” in the electricity businesses of Colonial First State Property Durham St Limited and the Colonial First State Property Trust)
- Colonial Holding Co No. 2 (NZ) Limited
- Colonial First State Property (NZ) Limited (“CFSPL”)
- Colonial First State Investments (NZ) Limited
- Colonial Holding Co (NZ) Limited

The above exemption is granted to the cross-involved entities subject to the following terms and conditions:

- (a) That CFSPL or any other person does not introduce a charge, directly or indirectly, to any person for the use of, or in connection with, any electricity lines business owned or operated in relation to the supply of electricity to tenants of the South City Centre.
- (b) That CFSPL or any other person does not prevent access, on reasonable terms and on a timely basis, to any embedded electrical wiring systems owned or operated in relation to the South City Centre, by any competing electricity supply business wanting to supply electricity to any tenants of the South City Centre.
- (c) That CFSPL or any other person does not at any time enforce any of the existing lease clauses which allow the option of supplying electricity to any tenants of the South City Centre, so that tenants are free to choose their electricity supplier.

- (d) That CFSPL or any of the cross-involved entities provide all tenants of the South City Centre to whom they supply electricity with relevant electricity consumption and billing information, on a timely basis, to enable the tenants to assess competitive options for the supply of their electricity.

In addition, the Commission, under 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 might be undertaken in New Zealand by or on behalf of CFSPL or any company or entity related to CFSPL or otherwise part of the Colonial Group 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.

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

- (a) That the business, involvement, interest or any other person does not introduce a charge, directly or indirectly, to any person for the use of, or in connection with, any electricity lines business owned or operated in relation to the supply of electricity to tenants of any future property of CFSPL or of any company or entity related to CFSPL or otherwise part of the Colonial Group.
- (b) That the business, involvement, interest or any other person does not prevent access, on reasonable terms and on a timely basis, to any embedded electrical wiring systems owned or operated in relation to any future property of CFSPL or of any company or entity related to CFSPL or otherwise part of the Colonial Group, by any competing electricity supply business wanting to supply electricity to any tenants of that property.
- (c) That the business, involvement, interest or any other person does not at any time enforce any lease clauses which allow the option of supplying electricity to any tenants of any future property of CFSPL or of any company or entity related to CFSPL or otherwise part of the Colonial Group, so that tenants are free to choose their electricity supplier.
- (d) That the business, involvement, interest or any of the cross-involved entities provide all tenants of any future property of CFSPL or of any company or entity related to CFSPL or otherwise part of the Colonial Group to whom they supply electricity with relevant electricity consumption and billing information, on a timely basis, to enable the tenants to assess competitive options for the supply of their electricity.
- (e) That the Commission is informed of the details of any future property investment and/or management activity, within 20 working days (as that term is defined in the Commerce Act 1986) from the day following the day it undertakes the activity, that is likely to breach the EIR Act and for which the business, involvement or interest is likely to rely on this exemption.

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

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

Dated this 28th day of October 1999

The Commission