

30 March 2012

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SENT BY EMAIL

Dear Susie

PUBLIC VERSION

Application by James Miller for Exemption from Part 3 of the Electricity Industry Act

1. We refer to our telephone discussions on 29 March. We understand that you are providing legal advice to the Electricity Authority to assist in its consideration of the exemption application by Mr Miller and Mighty River Power filed with the Authority on 21 March.
2. Responding to the specific points raised by you on our call:
 - (a) You have requested that we confirm whether the exemption is being sought under section 90(1)(a) or (b) of the Electricity Industry Act. The applicants are seeking an exemption of the "involvements" of Mr Miller from the application of Part 3 of the Act (as referred to in section 90(1)(a)) due to his directorship in AIAL and proposed directorship in Mighty River Power. While application is made for exemption from the whole of Part 3 of the Act, the specific provisions of the Act which would otherwise apply in the absence of the exemption are not the whole of Part 3 but only sections 75, 77-79 and 88. That is the reason why these provisions have been specifically referred to in the application;
 - (b) You asked why Mr Miller should not have to comply with sections 77-79 and 88 of the Act if the exemption is granted with the conditions sought in para. 22 of the application. The reasons for this include:
 - (i) as you will be aware, clause 4(1)(a) of Schedule 2 of the Act states that no account is to be taken for the purposes of Part 3 of a person's involvement if "the involvement is exempted by the Authority under s90". As a result, providing the Authority exempts Mr Miller from his involvement in both AIAL and Mighty River Power under s90(1)(a), then sections 77-79 and 88 will not apply as a result of Mr Miller's directorships on the basis that there would be no "connected retailer" for the purposes of section 77(3) (ie no account would be taken of Mr Miller's involvement in AIAL for the purposes of the connected retailer definition); and
 - (ii) secondly, under the conditions of exemption sought, Mr Miller would not have visibility of the terms on which Mercury Energy is supplying electricity over the AIAL network. This would mean, for instance, that he would not be in a position to sign a certificate stating that the terms in the AIAL use of system agreement were a true and fair view of the terms on which line function services were supplied for the purposes of section 77(4);

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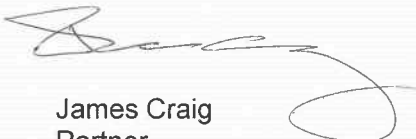
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- (c) You also asked why the other directors at AIAL with no involvement in Mighty River Power should not have to comply with sections 77-79 and 88 of the Act if the exemption is granted with the conditions sought. The reasons for this include:
- (i) firstly Mercury Energy would not be a "connected retailer" of AIAL as a result of Mr Miller's directorships if Mr Miller's involvement was exempted (for the reasons noted in para. 2(b)(i) above). As a result, sections 77-79 and 88 will not apply to the other directors of AIAL;
 - (ii) secondly, on the basis that the conditions of exemption would exclude Mr Miller (and Ms Withers) from being involved in decisions relating to Mighty River Power / Mercury Energy, the other directors at AIAL with no involvement in Mighty River Power would have no incentive to favour Mercury Energy in the supply of electricity over the AIAL network. There are seven directors at AIAL, meaning that (excluding Ms Withers and Mr Miller) there are still five directors with no link to Mighty River Power. Mercury Energy only supplies **[redacted]** of electricity over the AIAL network which has a total capacity of 102 GWh. As a result, this is not a case where Mercury Energy is supplying the bulk of electricity over the AIAL network such that AIAL would have a reason to favour its interests;
 - (iii) in circumstances where the other directors of AIAL have no reason to favour Mercury in the supply of electricity over the AIAL network, it would be unduly onerous to require those directors to comply with the additional requirements in sections 77-79 and 88. This is especially the case in circumstances where the penalties for breach of these sections are serious (ie summary conviction and substantial fines).

3. Please let us know if you have any questions, or if you would like us to expand on the above points. Please note that the information in bold square brackets in para. 2(c)(ii) above is confidential – as a result confidential and public versions of this letter have been provided.

Yours sincerely



James Craig
Partner
SIMPSON GRIERSON