

13 April 2022

Electricity Authority
PO Box 10041
WELLINGTON

Attention: Part 3 Notices
marketoperations@ea.govt.nz

**APPLICATION FOR EXEMPTION – SECTION 90 OF THE ELECTRICITY INDUSTRY ACT
2010 – MARK CAIRNS**

Application

1. Under section 90(1)(b) of the Electricity Industry Act 2010 ("**Act**"), an application is hereby made to the Electricity Authority ("**Authority**") for an exemption from compliance with sections 75, 77, 78, 79 and 88 under Part 3 of the Act.

Details of the Person Filing the Application

2. This application is made by Auckland International Airport Limited ("**AIAL**") on behalf of Mark Cairns.
3. Please direct any correspondence or queries relating to this application to Mary-Elizabeth Tuck and Shannon Chand in the first instance. Contact details are:

Auckland International Airport Limited
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Confidentiality

4. The fact and content of this application are not confidential.

Timetable

5. As publicly announced on 11 April 2022, AIAL intends to appoint Mr Cairns to its Board of Directors, on and with effect from, 1 June 2022, subject to the Authority's approval. Accordingly, we would be grateful if the Authority could provide its final decision on this application as soon as reasonably possible.



Background

6. Mr Cairns is currently an independent director of Meridian Energy Limited ("**Meridian**"). AIAL wishes to appoint Mr Cairns to its Board of Directors as an independent, non-executive director. Given Mr Cairns intends to remain a director of Meridian until next year, an exemption from certain provisions of Part 3 of the Act will be required for the period that Mr Cairns concurrently serves on both boards.
7. We note and rely on the Authority's previous exemptions for AIAL directors that also serve on the Meridian or Mercury Energy boards ("**the previous exemptions**"):
 - (a) Exemption dated 30 April 2012 for James Miller (now expired);
 - (b) Exemption dated 20 October 2015 for Patrick Strange;
 - (c) Exemption dated 20 August 2020 for Julia Hoare;
 - (d) Exemption dated 23 August 2021 for Ms Tania Simpson.
8. The previous exemptions were granted with certain conditions attached. As discussed more fully at paragraph 28, we propose that the same conditions as were applied to the previous exemptions apply to Mr Cairns in the present application.

AIAL's business

9. AIAL owns and operates Auckland Airport, including the distribution network across the Auckland airport precinct. The network comprises transformers, switchgear and underground cables (and associated protection and control equipment). The network is a secondary, or embedded network and connects to Vector's distribution network.
10. Accordingly, AIAL is registered with the Authority as a line owner, distributor and reconciliation participant. It distributes electricity to consumers at the airport on lines (not being lines that are part of the national grid). Because AIAL distributes over the 5GWh threshold for a 'distributor' under clause 2(c) of Schedule 2 of the Act, it is deemed to be a distributor.

Meridian's business

11. Meridian is an electricity generator and retailer.
12. Meridian's retailing of electricity and complementary products takes place through two brands, Meridian and Powershop ("**Retail Brands**").
13. Meridian supplies electricity to various consumers on the AIAL distribution network through its Retail Brands. Meridian also supplies electricity to AIAL itself.

Specific information

The nature of the involvement



14. Section 74 of the Act provides that a person is "involved" in a distributor, a generator or a retailer if the person:

(c) has material influence over a business that does any of those things [distribution, generation or retail].

15. Clause 7 of Schedule 2 of the Act defines "material influence" as being:

(1) Without limiting the ordinary meaning of the expression **material influence**, the following people are deemed to have material influence over a business:

(a) a director or manager of a person that carries on the business:

16. Therefore, for the purposes of the Act, Mr Cairns will be involved in both a distributor (AIAL) and a generator and retailer (Meridian).
17. However, as explained below, to the extent that Mr Cairns is involved in both companies, that involvement will not inhibit competition in the electricity industry.

Particular sections of Part 3 in respect of which an exemption is sought

18. Part 3 of the Act applies to Mr Cairns as follows:

Section 75

19. Section 75 prohibits a person who is involved in a distributor from being involved in a generator that has a total capacity of more than 250MW, which is generated by one or more generating plants that are directly connected to the national grid.
20. Meridian has 2,713MW for generation directly connected to the national grid. Consequently, section 75 is applicable.

Section 76

21. Section 76 does not apply because:
- (a) Meridian does not have 50MW of generation that is connected to AIAL's network, meaning it is not a "connected generator"; and
 - (b) Meridian does not retail more than 75GWh of electricity in a financial year to customers who are connected to AIAL's network, meaning it is not a "connected retailer" for the purposes of this section.

Sections 77 to 79 and 88

22. Sections 77 to 79 and section 88 of the Act apply to each director of a distributor in respect of which there is either a "connected retailer" or a "connected generator" (as defined in section 77).
23. Meridian is not a connected generator because it does not have any generation connected to AIAL's distribution network.



24. Meridian is, however, a connected retailer for the purposes of sections 77 to 79 and 88 of the Act. This is because, through its Retail Brands, Meridian retails more than 5GWh of electricity to customers connected to AIAL's network. As such, sections 77 to 79 and 88 of the Act would apply to Mr Cairns as a member of both the Meridian Board and AIAL Board.
25. As relevant, those sections provide:
- (a) *section 77*: every director of a distributor, where there is a connected retailer, must ensure that the distribution business has a comprehensive, written use-of-systems agreement, and that the terms of that agreement satisfy certain requirements;
 - (b) *section 78*: a distributor and a connected retailer must not pay, or offer to pay, any consideration to a retailer in respect of the transfer to a connected retailer of any retail customers who are connected to the distributor's networks;
 - (c) *section 79*: a director of a distributor must ensure that any rebates or dividends do not discriminate between customers of a connected retailer and customers of other retailers where those customers are connected to the distributor's networks; and
 - (d) *section 88*: each director of a distributor referred to in section 77(1) to ensure that the distributor discloses the quantity of electricity sold each financial year by connected retailers to customers who are connected to its local network.
26. Therefore, pursuant to section 90(1)(b), this application seeks, on behalf Mr Cairns, exemption from compliance with the following provisions of the Act:
- (a) section 75;
 - (b) section 77;
 - (c) section 78;
 - (d) section 79; and
 - (e) section 88
27. Mr Cairns is a suitable candidate for exemption from compliance with the above provisions of Part 3, because an exemption with appropriate conditions will not inhibit competition in the electricity industry and nor would it be contrary to the purpose of Part 3 of the Act or the Authority's objective set out in section 15 of the Act.

Conditions

28. The previous exemptions were granted with conditions. While we do not consider that any competition issues have or will arise from Mr Cairns' position as a member of both the AIAL and Meridian Boards, consistent with the previous exemptions, we propose that the same conditions be applied to Mr Cairns in this application.
29. Accordingly, while a director of both AIAL and Meridian:
- (a) Mr Cairns will not participate in any discussions or decision-making by Meridian or AIAL regarding matters that relate to or could affect or favour the supply of



electricity by Meridian (or disadvantage any other business selling electricity on AIAL's network other than Meridian) on AIAL's electricity distribution network or the provision of electricity lines services by AIAL to Meridian, including the:

- (i) selection of, and any negotiation with, any electricity retailer for the supply, or intended supply, of electricity to AIAL; and
 - (ii) supply, or intended supply, of electricity by Meridian to any new or existing consumer on AIAL's electricity distribution network; and
- (b) Mr Cairns will not disclose the outcome of any discussions or decision-making by AIAL to Meridian (and vice versa) on the matters referred to in paragraph 29(a), (together, the "**Conditions**").

30. We note that the proposed exemption will be specific to the cross-involvements created through Mr Cairns' involvement in AIAL and Meridian. It does not extend to any other interest or future cross-involvement of Mr Cairns.

The relevant markets in the electricity industry

31. Consistent with previous decisions, the relevant markets for the purposes of this application are:
- (a) the national electricity wholesale market;
 - (b) the electricity retail market corresponding with AIAL's network; and
 - (c) the electricity distribution market corresponding with AIAL's network.
32. That being the case, those markets are adopted as the relevant markets for the purpose of this Application.

The nature of any incentives or opportunities created

Electricity Retail Market

33. Consistent with the approach adopted by the Authority's Decision No.1 ("**Decision No.1**") dated 30 April 2012 in relation to James Miller, a director of AIAL and Mighty River Power Limited ("**MRPL**"), (which was consistent with prior Commerce Commission decisions and which we understand has been the approach adopted by the Authority in subsequent decisions), the focus of the Authority's enquiry in relation to electricity retail should be on AIAL's distribution network – i.e. electricity customers connected to AIAL's network.
34. As the Authority concluded in Decision No. 1, any opportunity for competition to be affected arising out of Mr Cairns' appointment to the AIAL Board will be effectively addressed by the limitations imposed on his participation in matters that relate directly to electricity supply or lines services between Meridian and AIAL. Such limitations include:
- (a) the Conditions proposed at paragraph 29 above mean that Mr Cairns will not have any involvement in any discussions about the terms and conditions of the use-of-systems agreement between AIAL and Meridian's Retail Brands and/or the supply



of electricity to AIAL by Meridian's Retail Brands. As such, there will be no opportunity for Mr Cairns to favour Meridian relative to other retailers;

- (b) clause 13 of the Meridian Board Charter provides that a Director is “required to take all reasonable steps to avoid actual, potential or perceived conflicts of interests” and “in certain circumstances to abstain from participating in any discussion or voting on matters in which they have a material personal interest”; and
 - (c) similarly, clause 2.11 of the AIAL Board Charter provides that a Director who finds themselves in a conflict between their appointment to the board of AIAL and an involvement in another organisation will “put in place appropriate processes, including excluding themselves from discussions in respect of such businesses, to ensure that the effect of such conflict of interest is minimised”.
35. Therefore, exempting Mr Cairns from compliance with the relevant provisions of the Act will not inhibit competition in the electricity industry.
36. We also note that at the time Mr Cairns is appointed there will be three directors who serve concurrently on the Meridian and AIAL boards. This should not cause any competition concerns, as all directors would be subject to the above conditions that prevent them from participating in decisions that could impact on electricity retail competition on AIAL's network.

National Electricity Wholesale Market

37. Meridian's generation assets are not directly connected to AIAL's distribution network, and there are no plans to have them connected in the future. As such, granting the exemption sought will not create incentives or opportunities to inhibit competition in the national electricity wholesale market.

Electricity distribution market corresponding to AIAL's network

38. As the Authority noted in Decision No. 1, because AIAL's network is a local natural monopoly, granting of the exemption cannot affect the level of existing competition or the scope for potential competition within this market. As a result, the granting of this exemption will not create incentives or opportunities to inhibit competition in this market.

Would the exemption permit any involvement in a distributor and a generator or a retailer that may create incentives or opportunities to inhibit competition in the electricity industry?

39. For the reasons set out above, the proposed exemption, together with the conditions proposed by the applicant, will not create any incentives or opportunities to inhibit competition in the electricity industry.

Would the exemption, in respect of an involvement, create incentives or opportunities for a distributor to cross-subsidise the connected generator or a directly connected generator of over 250MW?

40. There is no proposal for Meridian to connect any generation assets to AIAL's network. Therefore, granting Mr Cairns an exemption from compliance with sections 75, 77 to 79



and 88 of the Act, subject to the proposed conditions, would not give rise to incentives or opportunities for a distributor to cross-subsidise a connected generator.

41. Further, the proposed conditions to the exemption prevent Mr Cairns from participating in any future discussions or decision-making that relates to, or has the potential to affect or favour, the retail of electricity by Meridian on AIAL's network or the provision of electricity lines services to Meridian.

Would the exemption, in respect of an involvement, permit a relationship between a distributor and a retailer or generator which is not at arm's-length?

42. The provisions on arm's length rules in section 76 and Schedule 3 of the Act do not apply:
 - (a) Meridian is not a "connected generator" as its generation is not connected to AIAL's distribution network; and
 - (b) Meridian is not a "connected retailer" as it does not retail more than 75GWh of electricity to customers connected to AIAL's distribution network.
43. In any event, the Conditions proposed at paragraph 29 above mean that any relationship would remain at arm's length.

Declaration

44. Please find **attached** to this application a Declaration completed by AIAL on behalf of Mr Cairns in the prescribed form.
45. Please let us know if you have any questions.




DECLARATION

THIS APPLICATION is made by:

Auckland International Airport Limited, on behalf of Mark Cairns, confirms that:

- all the information requested by the Electricity Authority ("**Authority**") is provided;
- all relevant information known to the applicant is provided; and
- all information provided is true and correct as at the date of this application.

Auckland International Airport Limited undertakes to advise the Authority immediately of any material change in circumstances relating to the application.

Company name:	Auckland International Airport Limited
Date:	13 April 2022
Signed by:	
Position:	Mary-Elizabeth Tuck, General Manager Corporate Services