

# Freehills

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Our ref Rohan Madders  
Phone 03 9288 1231  
Email rohan\_madders@freehills.com.au  
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Mr Paul Bilyk  
Acting General Manager  
Regulatory Affairs - Electricity  
Australian Competition and Consumer Commission  
PO Box 1199  
Dickson ACT 2602

By facsimile: (02) 6243 1122

Dear Mr Bilyk

## **ACCC Interim authorisation of full retail competition Code changes**

We are instructed by AGL, United Energy, TXU, Powercor Australia and Citipower (the "Victorian industry").

The Victorian industry welcomes the making of the interim authorisation as a step towards providing the regulatory environment for the introduction of full retail competition. However, as with any authorisation an examination of the conditions attaching to it is required to determine its overall affect.

Accordingly, Victorian industry provides the attached table of comments on the conditions attaching to the interim authorisation and requests that the ACCC takes these matters into consideration in its consideration of whether to grant the proposed Code changes a full authorisation. Victorian industry makes this request in addition to our earlier table of comments delivered by David Lipshut by email on about 8 September 2000.

Yours faithfully

Freehills

per:

Rohan Madders

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Condition	Comment
C1	Victorian industry has no comment to make on this condition.
C2 and C3	<p>Victorian industry recognises that the principles set out by the ACCC reflect those in the minimalist Code changes. With the introduction of the NECA person<sup>1</sup>, Victorian industry is concerned that the principles are both broad and high level and their application will rely upon the interpretation to be given to those principles by the NECA person. Furthermore, the objective of ensuring a Metrology Procedure complies with the stated principles is not achieved because there is no way of enforcing the obligations of the NECA person (unless the NECA person is an agent of NECA as a Code Participant).</p> <p>To address this situation, Victorian industry makes the following comments:</p> <ul style="list-style-type: none"> <li>• The principles need to be reviewed to better reflect the risks, costs and benefits that may arise from a Metrology Procedure. Victorian industry believes that the following three new principles should be included (whoever is the approval body): <ul style="list-style-type: none"> <li>(v) be cost effective;</li> <li>(vi) provide for reasonable transitional arrangements to accommodate the changes in conditions arising from a metrology procedure [this is particularly to address the issues surrounding the time needed to implement changes, and the commercial position of affected parties, arising from the new environment when the metrology procedure becomes effective]; and</li> <li>(vii) facilitate competitive market conduct.</li> </ul> </li> <li>• Further, there needs to be definition of how conflict between the principles is to be managed. We note that clause 8.1 of the National Gas Access Code deals with a similar situation by providing that "to the extent that any of [the listed Reference Tariff and Reference Tariff Policy Objectives] conflict in their application to a particular Reference Tariff determination, the Relevant Regulator may determine the manner in which they can best be reconciled or which of them should prevail". This necessitates a clear definition of the objectives of the decision maker (in the proposed case, the NECA person) so that decision maker has some basis upon which to exercise the discretion vested in it. The Code and Market Objectives do not seem appropriate. Victorian industry suggests the objective of a Metrology Procedure is to deliver benefits to customers by facilitating competition and innovation in the delivery of metrology.</li> </ul>

<sup>1</sup> Regarding the single independent person appointed by NECA ("NECA Person"), industry's preferred position is that the role of this person be performed by the Metrology Co-ordinator (for a jurisdictional model) or the ACCC (for a national model), based upon submissions made by affected parties. Our comments on the NECA person, therefore, are only relevant if our preferred position is rejected.

Condition	Comment
	<ul style="list-style-type: none"> <li>• The governance and accountability structure for the NECA person needs to be defined (what are the objectives of this person, what is the process to be followed by this person (including timelines), what is the status of this person, how is this person to be funded and from whom is it to be independent, how would a decision of this person be impugned etc?). This is a new issue because Victorian industry has so far been of the view that the accountability mechanisms for the Metrology Co-ordinator as Government (judicial review) and Office of the Regulator-General (Office of the Regulator-General Act 1994) would be sufficient.</li> <li>• The ACCC notes that "there is no effective mechanism to ensure the Metrology Co-ordinator complies with the Code" and seeks to deal with this by a condition (C3) requiring the Metrology Procedure to comply with certain principles and a further condition (C5) requiring the approval process [of the NECA person] to assess whether the Metrology Procedure complies with the principles - but unless the NECA person is a Code participant there is no way to enforce condition C5.</li> <li>• If the "national" approver cannot be the ACCC (see below) it is not clear why the approver is not merely NECA (giving rise to the enforcement and governance features of the Code). Whilst NECA is a Code Participant, the risk of a Code Participant with a vested interest will not arise.</li> </ul>
C4	<p>Approval of processes to be adopted for the processing of metering data needs to be achieved before the development of technical systems to support full retail competition can commence. Whilst the interim authorisation <i>per se</i> does not alter this principle, condition C4 will have the effect that initial approval will take at least three months longer to be achieved than had been the Victorian industry's working assumption based upon approval being given by the Government as the initial Metrology Co-ordinator. The authorised code changes already recognise that there needs to be a period between approval and the effective date of a Metrology Procedure to allow participants to prepare for that effective date as certainty arises only from the approval of the Metrology Procedure.</p>
C5	<p>Victorian industry has always advocated a two step process for development (by affected parties) and approval (by an independent person) of the Metrology Procedure in the interest of timely approvals.</p> <p>We are currently in such a process where Victorian industry has submitted an initial Metrology Procedure for Victoria which is being considered for approval by the Government. The introduction of the NECA person into the process introduces a third step and will cause delays in approval of the initial Metrology Procedure. The basis of this condition appears to be the ACCC's concern that the Code changes as presented to it allow the Metrology Co-ordinator to design and then approve the Metrology Procedure for its jurisdiction and that in the interest of maintaining accountability and integrity these roles should be separated. Victorian industry supports this principle. It is Victorian industry's view that these objectives can be achieved by a mechanism which delivers a more timely outcome whereby a party or parties affected by the Metrology Procedure propose the initial Metrology Procedure to a Metrology Co-ordinator (at a jurisdictional or national level) for approval.</p>

Condition	Comment
	<p>A structure where the Metrology Co-ordinator is the designer may also be a brake upon innovation. A jurisdictional regulator, as Metrology Co-ordinator, is unlikely to be in a position technically to put forward proposed changes to the initial Metrology Procedure. The Victorian industry believes there is considerable scope for efficiencies to be achieved in the delivery of data management services over time but these are unlikely to be developed by a regulator. Practically, we are likely to see a process whereby an innovative affected person needs to put a proposal to the Metrology Co-ordinator which, if accepted, will need to be pursued with the NECA person by, presumably, the Metrology Co-ordinator. Once again a three step process involving unnecessary regulation and the wrong party, the regulator, advocating for the change is unlikely to lead to innovation.</p> <p>Victorian industry notes that the ACCC also refers to the consideration of Metrology Procedures in a transparent and nationally consistent manner. If a jurisdictional approach is rejected and if the purpose behind the Commission's condition is to achieve national consistency, the Victorian industry believes that the approving body ought to be the ACCC, rather than the NECA person. Once again, our position is based upon achieving a start to effective competition as soon as possible and a process for change which is facilitative, rather than a hindrance. Given that it is possible that a further step after the approval by the NECA person will be seeking authorisation from the ACCC under Part IV of the <i>Trade Practices Act 1974</i> at least one step in the approval process could be avoided by combining the steps of approval under the Code and authorisation under Part IV.</p>
C6	This is a condition consequential upon condition C3.
C7	It seems a drafting problem that the Metrology Co-ordinator "must have regard to" rather than "must comply with" the Code consultation procedures and there is certainly no way for this obligation on a Metrology Co-ordinator (a jurisdictional regulator and not a Code Participant) to be enforced. Furthermore, it seems odd that the Metrology Co-ordinator must have regard to the Code consultation procedures but the NECA person need not have regard to those procedures. This is a further example of why the procedures to be followed by the NECA person must be defined.
C8	This is a condition consequential upon conditions C9 and C10.
C9 and C10	Victorian industry considers that the proposed process for review gives rise to a number of process risks in that it engenders a number of practical difficulties arising from its joint conduct and lack of recognition of legitimate jurisdictional differences. Victorian industry considers that, in addition to the matters listed in condition C10, the review ought to be required to produce a recommendation to NECA for Code changes (if any) and to consider the transitional issues arising from any recommendations for change.