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19 September 2002

Mr John Martin  
Commissioner  
Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

Dear Commissioner

**NECA APPLICATIONS FOR AUTHORISATION: A90797, A90798 & A90799**

Thank you for the opportunity to present at the Pre Determination Conference and to make comment on your Draft Determination. Attached is a submission on behalf of the NGF outlining our concerns with the so called "good faith" provisions, as outlined by Mr Simon Maher of Southern Hydro at the Pre Determination Conference.

Individual generators will be making submissions on other areas of the Draft Determination.

Yours faithfully

GERRY GROVE-WHITE  
NGF CHAIRMAN

AUST. COMPETITION & CONSUMER COMMISSION CANBERRA 20 SEP 2002
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## Good Faith

### What is Good Faith?

NECA has requested within its proposed rebidding Code Changes that the code be amended to require generators' bids and rebids to be made in "good faith" and that this requirement should be accompanied by a reversal in the onus of proof. The ACCC draft determination has endorsed the concept that Market Participants must make offers, bids and rebids in good faith, but has rejected the reversal of the onus of proof.

The idea that bids and offers should be made in "good faith" sounds a fine and admirable concept, but what does it mean in practice?

While NECA and the Code Change Panel do not believe the term should be defined, and that there is sufficient legal precedent to give it meaning. When we take a look at Australian case law and statute we find that unfortunately "good faith" is not a precise concept, and without a strong definition its use is ambiguous and that many and various meanings have been ascribed to it including the following:

- (a) to act with honesty;<sup>1</sup>
- (b) to act with propriety;<sup>2</sup>
- (c) to act fairly;<sup>3</sup>
- (d) to act without malice;<sup>4</sup>
- (e) to act otherwise than in one's self interest;<sup>5</sup>
- (f) to act with caution or diligence;<sup>6</sup> and
- (g) to act without any wrong behaviour.<sup>7</sup>

It is also important to note that these definitions primarily relate to the concept of "good faith" in relation to consumer transactions between businesses and their clients and that it is not necessarily easy to adapt the definitions to apply to competitors operating within a competitive market.

The concept of "good faith" in a NEM Code context is therefore highly subjective and open to many different interpretations and possible confusion with other obligations, such as directors' obligations under the Corporations Act 2001. Section 181 of that Act states:

181 Good faith—civil obligations

*Good faith—directors and other officers*

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
  - (a) in good faith in the best interests of the corporation; and
  - (b) for a proper purpose.

An undefined "good faith" provision within the NEM Code needs to be reconciled against the "best interests of the corporation" and "for a proper purpose".

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<sup>1</sup> *Sydney Appliance Pty Ltd v Eurolinx Pty Ltd* (2001), 19 ACLC 633 at 638

<sup>2</sup> Id.

<sup>3</sup> Lucke HK 'Good faith and contractual performance', in *Essays on Contract*, LBC 1987 p160.  
<sup>4</sup> *Halsbury's Laws of Australia*, paragraph 300-157.

<sup>5</sup> *de Smith, Woolf and Jowell's Principles of Judicial Review*, Sweet & Maxwell, 1999 p452.

<sup>6</sup> Footnote 4

<sup>7</sup> *Mann & Anor v Sangria Pty Ltd* (2001) 19 ACLC 696 at 407.

## **Definition**

The Commission has recognised that the definition of good faith is not clear and to avoid uncertainty have “encouraged” NECA to develop a clear definition of “good faith”, however this has not been made a Condition of Authorisation. There is no requirement for NECA to develop this definition, and given the comments from NECA and the Code Change Panel in their submission to the Commission it seems unlikely that such a definition would be developed. The draft determination does not require NECA to use the Code Consultation process in the development of any definition and does not require NECA to bring the definition back to the Commission for authorisation. Any definition developed under these conditions would be subject to challenge, ultimately it would seem the only way the market would obtain certainty on the definition would be through a series of long and expensive court proceedings to establish case law specific to the particular definition of “good faith”. Until this has been established, Market Participants are left with an ambiguous Code requirement that must impact on the way they respond to market and plant changes.

## **What does it achieve?**

Even NECA’s own analysis has shown that most re-bidding activity results in increased competition and reduced market prices. No evidence has been provided that Market Participants are making make dispatch offers, network dispatch offers, dispatch bids or rebids that are not in good faith and no analysis has been provided to show how this proposed Code Change will benefit the market. The NEM is a real time energy only market and relies on the ability of market participants to respond to changes in the market. Energy limited plant in particular needs the ability to make rebids quickly to best manage its limited resources. Without

The possible confusion the definition of “good faith” will impinge on the flexibility and responsiveness of generations and their ability to react to market signals as prudent business may seek legal advice prior to bidding/rebidding. This will compromise efficiency enhancing responses by Market Participants to changed market signals and add significantly the compliance costs of businesses with no identified gains to the market.

In the draft determination the Commission rightly claims that the PASA and pre-dispatch forecasts issued by NEMMCO are important to the efficient running of the NEM. It then makes the unsubstantiated assertion that the imposition of a “good faith” clause into the bidding provisions of the Code will improve these forecasts. NEMMCO forecasts and participants’ responses to these forecasts are subject to many variables such as weather, NEMMCO demand estimates and plant performance. No evidence has been provided to show that this proposed Code change will have any impact on NEMMCO forecasting.

## **Summary**

The Code Change relating to “good faith” should not be authorised. NECA should be required to provide hard evidence to demonstrate that there is real issue of participants not behaving in “good faith” within the NEM. If this evidence can be produced, then analysis needs to be undertaken to ensure that any proposed Code change passes the Commission’s public benefit tests and will deliver a benefit to the public and that benefit would outweigh the detriment to the public. Only then should the Commission authorise any Code changes.