D02/63074
RAC000APOQ

Australian Competition & Consumer Commission

Determination

Applications for Authorisation

Amendments to the National Electricity Code

South Australian Full Retail Competition and System Planning Derogations

Date: 27 November 2002

Authorisation Nos:
A90838
A90839
A90840

File No:
C2002/1230

Commissioners
Fels
Bhojani
McNeill
Jones
Martin

Contents

Contents i

Glossary ii

1. Introduction 1

2. Statutory test 2

3. Public consultation process 4

4. South Australian full retail competition derogation 5

5. System planning derogation 8

6. Determination 9

Glossary

Code	National Electricity Code
Commission	Australian Competition and Consumer Commission
ESIPC	Electricity Supply Industry Planning Council
FRC	Full Retail Competition
FRMP	Financially Responsible Market Participant
LNSP	Local Network Service Provider
Minister for Energy	South Australian Minister for Energy
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
NSP	Network Service Provider
TPA	*Trade Practices Act* 1974

1. Introduction

On 16 August 2002, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A90838, A90839, A90840) of amendments to the derogations contained in chapter 9 of the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA), on behalf of the South Australian Minister for Energy under Part VII of the *Trade Practices Act* 1974 (TPA). The proposed derogations relate to the metering arrangements of chapter 7 of the code and the system planning provisions of chapter 5 of the code.

The proposed changes to the South Australian derogations:

- introduce transitional arrangements for metering services in the wholesale electricity market;
- provide the Local Network Service Providers (LNSPs) with a monopoly for the provision of metering services;
- ensure the derogation relating to system planning is consistent with the code as amended by the Network and Distributed Resources code changes gazetted by NECA on 8 March 2002; and
- require National Electricity Market Management Company (NEMMCO) to provide the Electricity Supply Industry Planning Council (ESIPC) with planning information.

Authorisation under Part VII of the TPA provides immunity from court action for certain types of market arrangements or conduct that would otherwise be in breach of Part IV of the TPA, where the Commission concludes that the public benefits of the arrangements or conduct would outweigh the anti-competitive detriment of such arrangements or conduct.

The Commission has prepared this determination outlining its analysis and views on the applications for authorisation of the amendments to the South Australian derogations contained in chapter 9 of the code.

Chapter 2 of this draft determination sets out the statutory test that the Commission must apply when assessing an application for authorisation. Chapter 3 contains an outline of the Commission's public consultation process. The Commission's analysis of the proposed derogations is set out in chapters 4 and 5 and the Commission's determination appears in chapter 6.

2. Statutory test

The applications were made under sub-sections 88(1) and 88(8) of the TPA.

Applications made under sub-section 88(1) of the TPA are for authorisation to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA. Further sub-section 88(6) provides that an authorisation made under sub-section 88(1) has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application.

Applications made under sub-section 88(8) of the TPA are for authorisation to engage in conduct that constitutes, or may constitute, the practice of exclusive dealing in accordance with the provisions of section 47 of the TPA. Further, sub-section 88(8AA) provides that where authorisation has been granted under sub-section 88(8) and this particular conduct is expressly required or permitted under a code of practice, the authorisation applies in the same terms to all other persons named or referred to as a party or proposed party to the code. Authorisations may also apply to any corporation who becomes a party in the future.

The TPA provides that the Commission shall only grant authorisation if the applicant satisfies the relevant tests in sub-sections 90(6) and 90(8) of the TPA. While sub-section 90(6) and sub-section 90(8) relate to different types of anti-competitive behaviour, the tests are essentially the same.

Sub-section 90(6) provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that:

- the provisions of the proposed contract, arrangement or conduct would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would, or would be likely to result from the proposed contract, arrangements or conduct.

Sub-section 90(8) provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that the proposed provision or conduct would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement, understanding or conduct should be allowed.

The detriment to be considered is limited to detriment caused by a lessening of competition. However, consideration of public benefits is less restricted and public benefits recognised in the past include:

- fostering business efficiency;
- industry rationalisation;

- promotion of industry cost savings;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
- expansion of employment;
- development of import replacements;
- growth in export markets; and
- arrangements which facilitate the smooth transition to deregulation.

In considering whether or not to grant authorisation the Commission must consider what the position is likely to be in the future if authorisation is granted and what the future is likely to be if authorisation is not granted.

If the Commission determines that the public benefits do not outweigh the detriment to the public constituted by any lessening of competition, the Commission may refuse authorisation or grant authorisation subject to conditions.

The value of authorisation for the applicant is that it provides protection from action by the Commission or any other party for potential breaches of certain restrictive trade provisions of the TPA. It should be noted, however, that authorisation only provides exemption for the particular conduct applied for and does not provide blanket exemption from all provisions of the TPA. Further, authorisation is not available for misuse of market power (section 46).

A more expansive discussion about the Commission's authorisation process and the statutory test that the Commission applies can be found in: *Guide to authorisations and notifications*, Australian Competition and Consumer Commission, November 1995.

3. Public consultation process

The Commission has a statutory obligation under the TPA to follow a public process when assessing an application for authorisation.

The Commission received the application for authorisation of the amendments to the derogations on 16 August 2002. Notification of the application and a request for submissions was advertised in the *Australian Financial Review* on 12 September 2002 and placed on the Commission's web site. Interested parties were asked to make submissions to the Commission regarding their views on the issues of public benefit and anti-competitive detriment arising from implementation of the proposed derogation. One submission was received from NEMMCO concerning the proposed system planning derogation.

The Commission produced a draft determination outlining its analysis and views on the derogations according to the statutory assessment criteria set out in chapter 2. The Commission then invited the applicant and other interested persons to notify it, in writing within 14 days of 6 November 2002, if they wanted the Commission to hold a conference in relation to the draft determination.[1] No request for a conference was received.

A person dissatisfied with the final determination may apply to the Australian Competition Tribunal for its review.

[1] For the purposes of the conference, an interested person is a person who has notified the Commission in writing that the person, or a specified unincorporated association of which the person is a member, claims to have an interest in the applications and the Commission is of the opinion that the interest is real and substantial.

4. South Australian Full Retail Competition Derogation

Full retail competition (FRC) is to commence in South Australia on 1 January 2003. The proposed derogation seeks to delay FRC for type 5,6 and 7[2] metering installations until July 2005.

The South Australian metrology coordinator recently approved its metrology procedures. Metrology procedures contain information on the devices and processes that measure the flow of electricity and establish the rules, processes, algorithms and procedures necessary to facilitate the conversion of metering data into a format suitable for wholesale market settlement. The South Australian metrology procedures provide the LNSP with exclusivity over meter provision, ownership and reading for a transitional period of two and a half years. Currently the LNSP is ETSA Utilities.

The proposed derogation relates to chapter 7 of the code, which deals with metering arrangements for the wholesale electricity market. The derogation amends the:

- definition of an LNSP;
- role of the responsible person;[3]
- arrangements for the payment for metering; and
- provisions for the accreditation and registration of metering providers.

LNSP is defined in the code as, within a local area, a Network Service Provider (NSP) to which that geographical area has been allocated by the Jurisdictional Regulator. A local area is a geographical area allocated to a NSP.

Clauses 7.2.2 of code provides that unless otherwise elected by the financially responsible market participant (FRMP), the LNSP is the responsible person for metering installations in the LNSP's local area.[4] Clause 7.2.3 allows the market participant to elect to be the responsible person. The derogation provides that the LNSP automatically becomes the responsible person for metering installation types 5, 6 and 7 for the transitional period.

Clause 7.3.6(a) of the code provides that the FRMP for a connection point is responsible for the payment of all costs associated with the provision, installation, maintenance, routine testing and inspection of the metering installation for that connection point. The proposed derogation provides that during the transitional period,

---

[2] Type 5 – manually read interval meters; type 6 – method of estimating electricity consumption from basic accumulation meters; type 7 – estimation of unmetered supplies eg streetlights and telephone boxes.

[3] The responsible person is defined as 'the person who has responsibility for the provision of a metering installation.'

[4] The code defines the financially responsible market participant as a market participant who has 'classified the connection point as one of its market loads; or classified the generating unit connected at that connection point as a market generating unit.'

the costs of the LNSP will be recovered in accordance with the Electricity Pricing Order, the LNSP's distribution licence or any other applicable South Australian regulatory instrument.

Clause 7.4.2 of the code requires a person to be accredited by and registered with NEMMCO to be a metering provider. The derogation provides that each LNSP licenced under the Electricity Act will be deemed to be an accredited and registered metering provider for metering types 5, 6 and 7. This is to be effective immediately prior to the introduction of the initial metrology procedure for type 5,6 and 7 metering installation and expires on 1 January 2004. Therefore, the LNSPs will have to register as a metering provider within that period.

Issues for the Commission

The arrangements that provide LNSPs with exclusivity for the role of the responsible person for metering installations types 5, 6 and 7 in the LNSPs' local area may be taken to be:

- an exclusionary provision, as the arrangements have the effect of restricting the supply of metering services to electricity retailers by providers other than the LNSP for a particular connection point;
- provisions substantially lessening competition, as the derogation may create a barrier to competition for the provision of metering services; and
- exclusive dealing, as the derogation requires electricity retailers to procure metering services from the LNSP for each connection point only.

What the applicant says

The South Australian Minister for Energy (Minister for Energy) states that delaying the introduction of FRC for a transitional period of two and a half years will facilitate a smooth transition to FRC. He is of the view that many of the arguments set out in Victoria's and New South Wales' applications apply equally in respect of South Australia's application. The Commission granted authorisations of the Victorian and New South Wales FRC derogations, on 8 August 2001 and 23 January 2002 respectively.

In particular the Minister for Energy notes the argument in the NSW application that customer choice in metering services is not a necessary precursor to the implementation of FRC. The Minister for Energy believes that the introduction of competition in metering provision will complicate and may delay the implementation of FRC in South Australia. Accordingly any lessening of competition that may result from the arrangements will be outweighed by the public benefits that will result from a smooth transition to FRC.

The Minister for Energy agrees with the Commission's finding in the Victorian FRC Derogation Determination that 'allowing LNSPs to have temporary exclusivity in meter

provision would simplify the process for customers who choose to switch retailers, and will minimise disruption to the metering data systems.'[5]

Commission's considerations

Consistent with its earlier determinations the Commission considers that, for the full benefits of FRC to be realised, it is important to have an environment conducive to customer churn. Allowing LNSPs to have temporary exclusivity in metering services may provide such an environment by simplifying the process for customers who choose to switch retailers and minimising disruption to metering data systems.

The Commission considers that the public benefit derived from the proposed derogation will be lessened if ringfencing guidelines are not appropriately administered. In its determination on the FRC code changes the Commission expressed concern that joint distribution, retail and metering businesses may misuse their position to deter other retailers from entering the market.[6] To address this problem the Commission imposed a condition requiring the jurisdictional regulators to review the effectiveness of the current ringfencing arrangements in preventing anti-competitive conduct between distribution businesses and their retail and metering businesses, by 31 December 2002. Where the ringfencing guidelines are deemed to be ineffective the jurisdictional regulator must develop new or revised guidelines.[7] The Essential Services Commission of South Australia is currently undertaking a review of the ringfencing guidelines.

The Commission found one minor drafting error in clause 9.30.1(3)(c) of the proposed derogation. The proposed derogation refers to clause 7.2.1 of the code, whereas it is intended to refer to clause 7.2.2 of the code. The Commission has corrected the error by imposing the following condition of authorisation:

C4 In clause 9.30.1(3)(c) the words 'clause 7.2.1' must be replaced with 'clause 7.2.2.'

[5] Determination – Victorian Full Retail Competition Derogations 8 August 2001 p10
[6] Determination – FRC and registration of code participants 1 August 2001 p23.
[7] Ibid p3.

5. System Planning Derogation

The proposed system planning derogation amends the existing derogation relating to system planning to ensure it is consistent with the code as amended by the Network and Distributed Resources code changes (code changes), which were gazetted by NECA on 8 March 2002. The code changes amend clauses referred to in the current clause 9.28.3 of the derogation necessitating a consequential amendment. The purpose of the current derogation is to enable a government body, the Electricity Supply Industry Planning Council (ESIPC),[8] to have an oversight role in relation to network planning in South Australia. The proposed derogation does not change this role.

The proposed derogation is intended to enhance the information available to the ESIPC. It requires NSPs to provide the ESIPC with the following information:

- the results of planing activities undertaken by NSPs;
- details of any augmentation plans;
- forecasts, technical limits and details of any proposed corrective actions; and
- information specified in clause 5.6.2(e), which is information required by the ESIPC to prepare the Annual Planning Report.

The proposed derogation also inserts a new clause 9.29A Monitoring and Reporting. This clause requires NEMMCO to provide the ESIPC with information the ESIPC reasonably requires to fulfil its role as the jurisdictional Responsible Officer under the National Electricity Market Memorandum of Understanding on the Use of Emergency Powers and the regulations under the Electricity Act.

Issues for the Commission

The Commission is concerned to ensure that there is consistency between the code and any derogations.

What the applicant says

NECA states that under the proposed derogation the NSPs in South Australia will not be relieved of their obligations to perform the planning activities required under clause 5.6, Planning and Development of Network, of the code. The proposed derogation simply requires the results of these planning activities to be communicated to the ESIPC to enable it to fulfil its roles.

NECA considers that the proposed derogation does not have any anti-competitive effect. It believes that by enhancing the information flow available to the ESIPC the proposed derogation will ensure that the pro-competitive structure currently in place operates efficiently and effectively.

---

[8] ESIPC provides expert, independent advice to the South Australian Treasurer and the Essential Services Commission of South Australia.

What interested parties say

The Commission received one submission regarding the proposed system planning derogation from NEMMCO. The concerns raised in the submission relate to the proposed new clause 9.29A Monitoring and Reporting.

NEMMCO believes it would be more efficient for the ESIPC to obtain real time data on power flows and voltage levels within the South Australian transmission network from ElectraNet SA, the South Australian transmission network service provider, rather than from NEMMCO. If the ESIPC were to obtain this information from NEMMCO, NEMMCO would first have to obtain it from ElectraNet SA.

The ESIPC may request information pursuant to clause 9.29A which is commercially sensitive. Such information may include dispatch, pre-dispatch and PASA information. NEMMCO believes that the proposed derogation should be amended to include an obligation on the ESIPC to preserve confidentially.

In an emergency situation the National Electricity Market Emergency Protocol requires NEMMCO to assess the relevant market data and advise the jurisdictional Responsible Officers on the market impact. NEMMCO has some concerns that by providing the information to the ESIPC the potential exists for a duplication of its market assessment role which may result in confusion due to contradictory conclusions. NEMMCO believes that any information the ESIPC receives should be strictly limited to information they require in relation to its role as Responsible Officer.

NEMMCO considers that clause 9.29A should be amended to require NEMMCO and the ESIPC to agree on how the requested information is to be provided. NEMMCO also believes that the clause should allow them to recover from the ESIPC any costs associated with establishing and operating a real time data link, if that is how the information is to be provided.

Commission's considerations

The Commission considers that there are essentially two public benefits resulting from this proposed derogation. The first is the public benefit that would result from ensuring that the derogation is consistent with the code. The second is the increased ability of the ESIPC to fulfil its roles, which include advising the South Australian Government on appropriate responses to emergency situations and security notices and developing electricity load forecasts.

Some of NEMMCO's concerns regarding clause 9.29A, Monitoring and Reporting, have been addressed by consultation with the ESIPC and Commission staff. The ESIPC agreed with NEMMCO that it is more efficient for them to obtain real time data from ElectraNet SA than NEMMCO. In relation to NEMMCO's concerns about the confidentially of information the ESIPC believes that it will be required by clause 8.6.1 of the code to keep confidential any confidential information supplied to it by NEMCO pursuant to clause 9.29A of the proposed derogation. Commission staff received legal advice regarding this provision. The legal advice stated that this provision was sufficient to require the ESIPC to preserve the confidentiality of any information provided to it by NEMMCO pursuant to clause 9.29A of the derogation.

The Commission is satisfied that the ESIPC will be required by clause 8.6.1 of the code to keep confidential any information provided to it by NEMMCO pursuant to clause 9.29A of the proposed derogation.

NEMMCO's concerns regarding the information the ESIPC may receive from NEMMCO and the cost of providing information via a real time data link have been addressed by imposing the condition of authorisation listed below.

C2 Clause 9.29A of the derogation must be amended so that:

- **the information to be provided to the ESIPC pursuant to clause 9.29A(a) is limited to information relating to interconnectors to South Australia and South Australian market data; and**

- **any additional costs incurred by NEMMCO as a result of providing information via a real time data link are to be recoverable from the ESIPC.**

6. Determination

This determination is made on 27 November 2002. The Commission considers that the proposed arrangements and conduct set out in the South Australian derogations in relation to the transition to full retail competition and system planning:

1) are likely to result in a benefit to the public which outweighs the potential detriment from any lessening of competition that would result if the proposed conduct or arrangements were made, or engaged in; and

2) are likely to result in such a benefit to the public that the proposed conduct or arrangements should be allowed to take place or be arrived at.

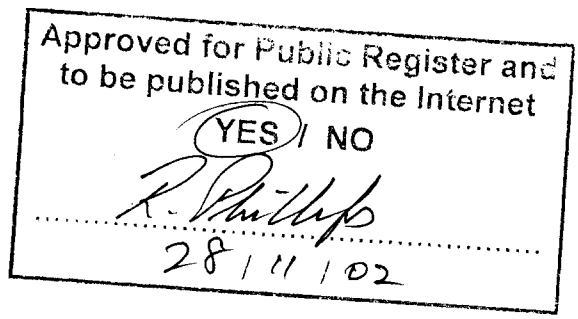
For reasons outlined in chapters 4 and 5 of this determination, the Commission grants authorisation of the amendments to the derogations contained in application numbers A90838, A90839 and A90840, subject to the following conditions:

C1 **In clause 9.30.1(3)(c) the words 'clause 7.2.1' must be replaced with 'clause 7.2.2.'**

C2 **Clause 9.29A of the derogation must be amended so that:**

- **the information to be provided to the ESIPC pursuant to clause 9.29A(a) is limited to information relating to interconnectors to South Australia and South Australian market data; and**

- **any additional costs incurred by NEMMCO as a result of providing information via a real time data link are to be recoverable from the ESIPC.**



Approved for Public Register and
to be published on the Internet
YES / NO

R. Phillips
28/11/02