

**Draft
Determination**

Applications for Authorisation

Amendments to the National Electricity Code

**Australian Capital Territory Full Retail
Competition Derogations**

Date: 5 February 2003

Authorisation Nos:

A90858

A90859

A90860

File no: C2002/1790

Commissioners:

Fels

Bhojani

Jones

McNeill

Willett

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Glossary

ACT	Australian Capital Territory
ASP	Accredited Service Provider
Code	National Electricity Code
Commission	Australian Competition and Consumer Commission
FRC	Full Retail Competition
FRMP	Financially Responsible Market Participant
ICRC	Independent Competition and Regulatory Commission
LNSP	Local Network Service Provider
MWh	Megawatt hour
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
TPA	Trade Practices Act 1974

1. Introduction

On 11 December 2002, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A90858, A90859 and A90860) of amendments to the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the Australian Capital Territory (ACT) Treasury.

The proposed amendments are to chapter 9, Part C of the code and relate to the metering arrangements in chapter 7 of the code. A further amendment clarifies the way in which responsibility for performing the role of Jurisdictional Regulator in the ACT is assigned.

The ACT Treasury is seeking to amend the derogations contained in chapter 9 of the code, so as to delay the introduction of competition for metering services for a transitional period to coincide with other transitional arrangements established as part of the ACT Full Retail Competition program.

The proposed changes to the ACT 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.

Authorisation under Part VII of the *Trade Practices Act 1974* (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. Authorisation may be granted 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 draft determination outlining its analysis and views on the applications for authorisation of the code changes. 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 code changes is set out in chapter 4 and the Commission's draft determination is in chapter 5.

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
- 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
- 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*, 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 applications for authorisation of amendments to the derogations on 11 December 2002. Notification of the applications and a request for submissions was placed in *The Australian Financial Review* on 19 December 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 amendments to the derogations. The Commission did not receive any submissions.

The Commission has produced this draft determination outlining its analysis and views of the amendments to the derogations according to the statutory assessment criteria set out in chapter 2. The Commission invites the applicant and other interested persons to notify whether the applicant or other interested persons wish the Commission to hold a conference in relation to this draft determination.¹

If the applicant or an interested party notifies the Commission in writing within 14 days of 6 February 2003 that it wants the Commission to hold a conference, the Commission will hold a conference in Canberra, at a time and place to be notified. The applicant, interested parties who receive a copy of the draft determination and any other interested parties whose presence the Commission considers appropriate are entitled to participate in the conference.

Following the conference, the Commission will take into account relevant issues raised at the conference, and any related submissions, and will issue a final determination. If no pre-determination conference is called or written submissions received, then this draft determination will become the final determination.

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. ACT Full Retail Competition derogations

4.1 Background

The Commission has granted authorisation to code changes that facilitate the introduction of full retail competition (FRC code changes).² The FRC code changes introduced a new role into the code, that of the metrology coordinator. The metrology coordinator is responsible for developing a metrology procedure for metering installation types 5-7.³

The metrology procedures will contain information on the devices and processes that measure the flow of electricity and will establish the rules, processes, algorithms and procedures necessary to facilitate the conversion of metering data into a format suitable for wholesale market settlement.

In the ACT, the ACT Department of Treasury is the metrology coordinator, and is currently in the process of developing its metrology procedures, which provide the LNSP with exclusivity over meter provision, ownership and reading for a transitional period. The proposed derogations relate to chapter 7 of the code, which deals with metering arrangements for the wholesale electricity market.

The derogations amend:

- the definition of an LNSP
- the role of the responsible person
- the arrangements for the payment for metering
- the provisions for the metering provider.

The geographical area allocated to a Network Service Provider (NSP) is called a 'local area'. Chapter 10 of the code defines the LNSP as 'Within a local area, a Network Service Provider to which that geographical area has been allocated by the Jurisdictional Regulator'.

Clauses 7.2.2 and 7.2.3 of the FRC code changes specify that unless otherwise elected by the financially responsible market participant (FRMP), the LNSP is the responsible person for metering installations in the LNSPs' local area.⁴ The derogations provide

² The ACCC authorised the FRC code changes on 1 August 2001.

³ Type 5 - manually read interval meters; type 6 – method of estimating electricity consumption from basic accumulation meters; and type 7 – estimation of unmetered supplies (eg streetlights, telephone boxes).

⁴ Chapter 10 of 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 responsible person is defined as 'the person who has responsibility for the provision of a metering installation.'

that: the LNSP automatically becomes the responsible person for metering installation types 5, 6 and 7 for a transitional period of approximately three years, commencing from the date at which the metrology procedures come into effect. This was expected to be 1 March 2003, but due to the bushfires in Canberra, the start of the FRC program in the ACT has been changed to 1 July 2003.

Clause 7.3.6 of the FRC code changes states 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 derogations provide that during the three year transitional period, the costs of the LNSP will be recovered in accordance with the distribution businesses' licence conditions and the price determination made by the Independent Competition and Regulatory Commission (ICRC).

Clause 7.4.2 of the code requires a person to be accredited by and registered with NEMMCO to be a metering provider. The code also specifies that the responsible person must engage a metering provider to carry out the metering installation activities, unless that responsible person is the LNSP and a registered metering provider.

The LNSP is already responsible for first tier metering and performs the following functions that are similar to those that will be required for types 5, 6 and 7 metering installations:

- Meter provision
 - Installation only of the whole current (direct connected) meters ("Metering Provider category A")
 - Provision, installation and maintenance of the meter, data logger (where required) and current transformer (where required) ("Metering Provider category B")
- Metering data services
- Collection only of energy data ("Metering Provider category C").

The processing of energy data and transfer of this data to NEMMCO ("Metering Provider category D") is a new function that is currently not undertaken by the LNSP.

The derogations provide that, to facilitate the LNSP immediately taking on the role of responsible person for types 5, 6 and 7 metering installations, the LNSP will be deemed to be accredited and registered as a metering provider category A, B and C, for these metering types. This is to be effective from the introduction of the metrology procedure for the relevant type of metering installation.

However, the proposed derogation will expire on 29 February 2004. Therefore, the LNSPs will have to register as a metering provider before that date. In addition, NEMMCO's right to deregister a LNSP as a metering provider under clause 7.4.3 is expressly preserved during this period.

The proposed amendments to the derogations also provide for the removal of clauses 9.19 and 9.23.3 which refer to the Energy and Water Charges Commission. This organisation no longer exists.

4.2 Issues for the Commission

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

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

4.3 What the applicant says

The ACT Government states that it would be desirable to delay the introduction of competition for metering services for a transitional period of approximately three years commencing from the release of the metrology procedures, to facilitate a smooth transition to FRC. It argues that making the LNSP the responsible person for metering installation types 5-7 for a transitional period will provide simplicity and clarity of obligations relating to meter provision and metering data services. The ACT Government argues that the introduction of a large number of new systems could impede FRC, as there is a greater risk of failure of one of those systems. It argues that an ineffective transfer process would damage consumer confidence in FRC and deter consumers from choosing to switch suppliers, thus limiting the development of competition.

While the ACT Government recognises the importance of maximising contestability in provision of settlement-ready data, it contends that metering competition is not necessary for the benefits of FRC to be realised by customers. It argues that introducing metering competition will add an extra layer of complexity to the introduction of FRC, and that this would hinder the development of core competition, particularly in terms of customers choosing to switch retailers.

The ACT Government states that the introduction of systems and processes necessary for competition in metering and data services is feasible, but that at this stage, the net benefits of introducing them have not been determined.

The ACT Government contends that as the LNSP is currently responsible for most of the tasks relating to meter provision and metering data services, they are in the best position to assume the role of the responsible person. It argues that as the responsible persons, LNSPs can best facilitate the development of the new systems and processes required by the introduction of metering installation types 5-7.

The ACT Government argues that having the LNSP act as the exclusive responsible person will reduce the time and work relating to metering provision for metering installation types 5, 6 and 7. It contends that these arrangements will allow the relevant industry participants to benefit from the experience of identifying the optimal systems and processes required to provide maximum benefits to consumers. It also claims that this will facilitate cost effective and technically efficient solutions, and create opportunities for innovation in the market.

The ACT Government states that the economies of scale currently enjoyed by the LNSP place them in the best position to supply metering services for the initial stages of FRC. It argues that new retailers can only achieve economies of scale through technological innovation, which is not likely in the short term.

The ACT Government claims that competitive benefits are already being realised in meter provision and metering data services. The LNSP already out-sources some of these functions, engaging metering providers based on competitive tenders. The ACT Government claims that this provides competitive benefits by creating competition for the market, rather than in the market. It contends that having the FRMP act as the responsible person for metering installation types 1 to 4 for customers consuming greater than 160MWh per annum has not reduced the costs of providing those services. It further states that reduced costs are less likely to occur for consumption levels less than 160MWh per annum.

4.4 Commission's considerations

The Commission considers that it is important to have in place an operating environment that is conducive to customer churn, for the full benefits of FRC to be realised. The Commission agrees with the ACT Government's view 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.

Given the infancy of retail contestability, the Commission considers it inappropriate for it to determine whether metering contestability is required at this stage. In its determination on the FRC code changes, the Commission imposed a condition that requires the jurisdictional regulators to conduct a review, by 31 December 2003, that includes consideration of whether meter ownership acts as a barrier to customer switching. Therefore, the Commission considers it appropriate to grant authorisation to the derogations pending the outcome of the review of meter ownership.

In relation to clause 9.24A.2 of the application, the Commission supports the imposition of the requirement for the terms of the offer from the LNSP to the Responsible Person must be fair and reasonable and must not unreasonably discriminate between retailers. Further, the Commission supports the implementation of provisions to allow the ICRC to resolve disputes where terms may be seen as unfair or unreasonable.

The Commission authorises the derogation. The implication of this decision is that all metering services, including meter ownership and installation, meter reading, and

metering data agency will become contestable at the end of the derogation, unless the jurisdictional review determines otherwise for meter ownership.

5. Draft Determination

On 11 December 2002, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A90858, A90859 and A90860) of amendments to the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the ACT Treasury.

The proposed amendments are to the ACT derogations contained in chapter 9 of the code, and seek to delay the introduction of competition for metering services for a transitional period to coincide with other transitional arrangements established as part of the ACT FRC program. A further amendment clarifies the way in which responsibility for performing the role of Jurisdictional Regulator in the ACT is assigned.

The applications were made under sub-sections 88 (1) and 88 (8) of the *Trade Practices Act 1974* (the TPA) to:

- Make or give effect to a contract or arrangement, or arrive at an understanding, where a provision of that proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA (Form A);
- Make or give effect to 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 (Form B); and
- Engage in conduct that constitutes or may constitute the practice of exclusive dealing, within the meaning of section 47 of the TPA (Form E).

For the reasons outlined in Chapter 4 of this draft determination, the Commission considers that the arrangements and conduct set out in the ACT derogations for which authorisation is sought under subsection 88 (1) and 88 (8) of the TPA:

- 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
- 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.

The Commission is also satisfied that, in all the circumstances, the conduct for which authorisation is sought under subsection 88 (8) of the TPA in respect of proposed conduct to which subsections 47 (6) and (7) apply would be likely to result in such a benefit to the public that it should be allowed to take place.

The Commission is also satisfied that, in all the circumstances, the conduct for which authorisation is sought under subsection 88 (1) of the TPA in respect of provisions

which may be exclusionary provisions would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.

The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to applications A90859, A90860 and A90861. The Commission proposes to limit the period of the authorisations to 30 June 2006.