Australian Competition & Consumer Commission

Draft Determination

Applications for Authorisation

National Electricity Code Administrator

Queensland Technical Derogations

Date: 12 September 2001

Authorisation nos:
A90751
A90752
A90753

Commissioners:
Fels
Shogren
Martin

File no: C2000/1620

Contents

Glossary

Code	National Electricity Code
Commission	Australian Competition & Consumer Commission
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
QNI	Queensland/ New South Wales Interconnector
TNSP	Transmission Network Service Provider
TPA	Trade Practices Act 1974

1. Introduction

On 24 October 2000, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (A90751, A90752 and A90753) of changes to the National Electricity Code (Code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the Queensland Government under Part VII of the *Trade Practices Act 1974* (TPA).

These Code changes were designed to facilitate the early commissioning of the Queensland/ New South Wales Interconnector (QNI), in February 2001, on the basis that QNI was essential to meeting Queensland's 2000/2001 summer demand. The Commission granted a conditional interim authorisation to amend the code on 6 December 2000, pending a Commission final determination.

1.1 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.

1.2 Commission processes

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 the changes to the Code on 24 October 2000. A public consultation process commenced on 28 October 2000, with a request for submissions in the Australian Financial Review and on the Commission's Internet 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 changes. In response to this request, the Commission received one submission, from Powerlink. A copy of that submission has been placed on the Commission's public register.

The Commission has produced this draft determination outlining its analysis and views on the proposed changes to the Code according to the statutory assessment criteria set out in section 1.1. The Commission now invites the applicant and other interested persons to notify it within 14 days of 12 September 2001 whether the applicant or other interested persons wish the Commission to hold a conference, pursuant to section 90A of the TPA in relation to this draft determination.

If the applicant or an interested party notifies that they want the Commission to hold a conference, the Commission will appoint a date, time and place for the holding of the conference and notify all interested parties. The applicants, 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 issues raised at the conference, and any related submissions, and will issue a final determination. If no pre-determination conference is called 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.

2. The Applications

The proposed changes to the Code clarify and make minor amendments to the Queensland derogations, which were granted authorisation on 19 October 1998, by:

- making sure the definition "isolation period" no longer applies beyond interconnection of QNI (clause 9.32.1); and
- clarifying the terminology in clause 9.32.2 on when derogations will cease.

Additional amendments extend the end dates of eight technical derogations, to 31 December 2002 . These technical derogations were initially planned to cease at the earlier of, interconnection of QNI or 31 December 2002. The amended clauses include:

- forward looking loss factors (clause 9.35.11);
- harmonic voltage distortion limits (clause 9.37.13);
- voltage balance limits (9.37.14);
- localised Queensland stability requirements (clause 9.37.15);
- fault clearance times (9.37.16);
- automatic reclosure of overhead transmission lines (clause 9.37.17);
- quality of electricity generated (clause 9.37.18); and
- harmonics and voltage notching for Queensland distribution business customers (clause 9.37.22).

While these derogations have generally been extended to 31 December 2002, the localised Queensland stability derogation would not apply if there was: a material risk of cascading network security issues; or a material impact on the power system outside the Queensland region.

3. What the applicant said

At the time the Queensland derogations were authorised, the QNI was anticipated to be commissioned by the end of 2001. It was envisaged that this would be a sufficient period for the Queensland transition to the National Electricity Market (NEM) arrangements and, where necessary, allow Queensland market participants to seek permanent derogations under chapter 8 of the Code.

Subsequently, the QNI was advanced ahead of the original timetable to ensure, in part, Queensland had adequate power supplies over the 2000/2001 summer. The Queensland Government stated that given the recent growth in demand in Queensland, the early commissioning date was essential to meet the Queensland summer demand and to not jeopardise supply to Queensland electricity consumers.

The Queensland Government indicated that it was unlikely that the appropriate derogation processes could be completed prior to the earlier commissioning date of QNI. As a result, it stated that there is a risk that affected Code participants will be unable to comply with the relevant technical requirements of the Code. To avoid this risk, the Queensland Government sought a temporary extension to a number of technical derogations and a number of minor changes of a definitional nature.

The Queensland Government stated that it has not sought to make the Queensland derogations permanent. The substance of the application is to temporarily extend the Queensland derogations to ensure Queensland has sufficient time to be fully prepared to enter the NEM.

The Queensland Government stated that the changes would:

- ensure that affected Code participants will be able to continue the process for an application for derogations in relation to the relevant technical matters under Chapter 8 of the Code, without the risk of being in breach of existing Code provisions imediately following interconnection;

- be consistent with ensuring a smooth transition to a fully interconnected national market; and

- avoid any delay in interconnection that may jeopardise the supply of electricity into Queensland during the 2000/2001 summer period.

4. Submissions from interested parties

A submission was received from PowerLink, the Queensland Transmission Network Service Provider (TNSP). PowerLink argued that the current proposed wording of clause 9.37.15 would provide insufficient safeguards to avoid any adverse impact on the security of interconnected system after QNI was commissioned. In particular, it argued that these risks would extend to participants outside the Queensland region. Powerlink stated that these concerns would be addressed if part of the proposed new clause 9.37.15 was amended by replacing the proposed new words:

> The modification does not apply where there is a material risk of cascading network security issues or a material impact on the *power system* outside the Queensland region.

with the words:

> The relevant *Network Service Provider* must seek NEMMCO's consent prior to relying on this clause 9.37.15(a). NEMMCO may refuse to grant such consent where NEMMCO reasonably considers that there is a risk of cascading effects on *power system security* or a material impact on the *power system* outside the Queensland region.

PowerLink proposed that the Commission authorise the application, placing a condition on that authorisation, to give effect to its suggested changes to clause 9.37.15. PowerLink's proposed condition is designed to address the issue of system security outside of the Queensland region by having NEMMCO as an independent umpire, to determine security risk to systems outside of Queensland.

5. Commission considerations

The Commission maintains its view, originally expressed in its initial authorisation of the Code, that varying transition periods and different derogations in the participating jurisdictions may have anti-competitive effects, by providing a competitive advantage to participants in their respective jurisdictions. Furthermore, that the operation of the derogations, by limiting the universal application of the Code, will impact on the overall public benefits which the Code is expected to deliver.

When it considered the Queensland derogations, the Commission engaged the services of a consultant to examine the impact of Queensland's technical derogations on the remainder of the NEM. In its subsequent determination, of 19 October 1998, the Commission accepted the consultant's view that the derogations would have limited impact while Queensland remained isolated from the NEM. However the Commission was concerned about the anti-competitive detriment the derogations would have when Queensland joined the remainder of the NEM.

Given those concerns, the Commission imposed the condition of authorisation requiring these technical derogations to cease on Queensland's interconnection with the NEM. At that time it was anticipated that QNI would be commissioned in late 2001. The Commission believed that this would provide sufficient time to allow for Queensland's orderly transition to the Code and, where necessary, would allow Queensland facility owners to apply for permanent derogations under clause 8.4 of the Code.

However, the applicant has argued that, as QNI was completed ahead of schedule, there had been insufficient time for Queensland facility owners to apply for permanent derogations. Rather than delaying the commissioning of QNI, the applicant sought a short term extension of the end date of the technical derogations to 31 December 2002, the date at which most of the jurisdictional derogations cease.

While the Commission accepts the applicant's arguments that there will be public benefits from the early commissioning of QNI, it is concerned about the anti-competitive detriments of extending the duration of these derogations. In particular, the Commission is concerned that extending Queensland's stability requirements derogation (cl. 9.37.15) beyond the interconnection date, and into the longer term, may increase the potential for a stability event in Queensland to have an adverse impact on the other interconnected NEM regions.

However, the Commission is satisfied that the extent of any anti-competitive detriment would be limited if the derogation was amended in the way suggested by Powerlink; that is, by assigning NEMMCO the role of independent adjudicator on these matters. A further relevant consideration in the Commission's assessment that the extent of any anti-competitive detriment would be limited is the applicant's statement that it has not sought to make the derogations permanent and that a separate process, under chapter 8 of the Code, is underway on the long term future of these derogations.

The Commission considers, therefore, that the proposed Code changes will deliver public benefits that outweigh any associated anti-competitive detriment subject to the condition that that clause 9.37.15 be amended. This condition is the same as that included in the Commission's interim authorisation of 6 December 2000, so it should not require any

additional Code changes nor alter the operation of the NEM since the commissioning of the QNI in February 2001.

6. Draft determination

For the reasons outlined in section 5 of this draft determination, the Commission concludes that in all circumstances the proposed arrangements and conduct for which NECA has sought authorisation:

- are likely to result in a benefit to the public which outweighs the detriment from any lessening of competition that would be likely to result from the arrangements; and
- are likely to result in such benefit to the public that the arrangements should be allowed to be given effect to.

The Commission therefore proposes, subject to any pre-determination conference pursuant to section 90A of the TPA that might be requested, to grant authorisation in respect of applications A90751, A90752 and A90753.

Subject to the consideration of any issues raised during a possible pre-determination conference, the Commission proposes to limit the period of authorisation to 31 December 2010.

The Commissions authorisation is granted subject to the condition that, the proposed wording for clause 9.37.15(a) must be deleted and replaced with:

> The requirements for stability as defined in paragraph S5.1.8 of schedule 5.1 of the *Code* are modified, for both NEMMCO and the relevant *Network Service Provider*, by the requirement that, until the end of 31 December 2002 and to the extent that they apply to localised supply arrangements in the Queensland region, a *Network Service Provider* whose network is a *Queensland transmission network* must use reasonable endeavours to ensure that the stability criteria are met except for events that the *Network Service Provider* reasonably believes to be low probability events or where it may be uneconomic to augment the *transmission network* to an extent that satisfies the above stability requirements. The relevant *Network Service Provider* must seek NEMMCO's consent prior to relying on this clause 9.37.15(a). NEMMCO may refuse to grant such consent where NEMMCO reasonably considers that there is a risk of cascading effects on *power system security* or a material impact on the *power system* outside the Queensland region.