

Determination

Applications for Authorisation

Amendments to the National Electricity Code

Ombudsman access to metering data

Date: 20 August 2003

Authorisation Nos:

A40083

A40084

A40085

Commissioners:

Samuel

Bhojani

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Willet

File No: C2003/432

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Glossary

Code	National Electricity Code
Commission	Australian Competition and Consumer Commission
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company Ltd
TPA	Trade Practices Act 1974
Tribunal	National Electricity Tribunal

1. Introduction

On 27 March 2003, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A40083, A40084 and A40085) of amendments to the National Electricity Code (Code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the Victorian Energy and Water Ombudsman (EWOV) and the Australia and New Zealand Energy and Water Ombudsman Network (ANZEWO).

The changes are to Chapters 7 and 8 of the Code and relate to access to relevant market settlement and transfer solutions information (MSATS) by an Ombudsman set up pursuant to an Ombudsman scheme. EWOV and ANZEWO are seeking direct access, for the relevant Ombudsman in each state, to MSATS information where it relates to a specific complaint.

The amendments to the Code:

- expressly authorise NEMMCO to provide relevant information in response to a bona fide request from an Ombudsman;
- require NEMMCO to advise the Ombudsman if any of that information is confidential in terms of the market rules; but
- make the supply of that information an express exemption from those confidentiality provisions.

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, 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 Code.

Chapter 2 of this 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 changes is set out in chapter 4 and the Commission's 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; 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 applications for authorisation of Code changes on 27 March 2003. Notification of the applications and a request for submissions was placed in *The Australian Financial Review* on 17 April 2003 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 changes. The Commission received submissions from:

- Energex Retail Pty Ltd; and
- Ergon Energy Pty Ltd;

The Commission produced a draft determination outlining its analysis and views of the Code changes according to the statutory assessment criteria set out in chapter 2. Following the release of the draft determination on 10 July 2003, the applicant and interested parties were provided with the opportunity to call a pre-determination conference in relation to the draft determination.

The Commission did not receive a request for a pre-determination conference and no further issues were raised.

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

4. Commission’s assessment

4.1 The applications

4.1.1 Ombudsman schemes

In Victoria, electricity distribution, transmission and retail licences issued under the Electricity Industry Act 2000 require each licensee to enter a customer dispute resolution scheme approved by the Essential Services Commission.

The Energy and Water Ombudsman (“EWO”) scheme is a customer dispute resolution scheme approved by the Essential Services Commission.

Participation in the EWO scheme is intended to allow electricity, gas and water licensees and other water authorities to satisfy the relevant licence conditions and legislative requirements.

The functions of the Ombudsman are to receive, to investigate and to facilitate the resolution of:

- (a) complaints as to the provision or supply of (or the failure to provide or supply) electricity, gas or water services by a member to a customer as required by a licence or agreement or under legislation;
- (b) billing disputes;
- (c) the administration of credit and payment services in the circumstances of a particular customer;
- (d) disconnection, restriction and refundable advance complaints;
- (e) complaints from owners or occupiers of land or other property about the way in which a member has exercised its statutory powers in relation to that particular land or other property or in relation to neighbouring land or other property;
- (f) complaints referred by the Essential Services Commission in relation to the conduct of a member’s electricity, gas or water services business; and
- (g) such other complaints as may, by agreement with the Ombudsman and the complainant, be referred to the Ombudsman by a member.

This scheme is substantially similar to the scheme for the relevant Ombudsman in each of the other NEM jurisdictions.

4.1.2 Information access provisions

At present, the Ombudsman must request all relevant documentation from a Code Participant subject to a complaint. The procedure for the Ombudsman to gather such information is provided under each Ombudsman’s scheme. The basic procedure

involves the Ombudsman notifying a Code Participant of an investigation, after which the Code Participant is required to submit all relevant documentation to the Ombudsman, subject to privacy and confidentiality obligations

4.1.3 Proposed Changes

The proposed changes would insert a general power into the Code allowing an Ombudsman to request the information from NEMMCO instead of requesting the information from the Code Participant. Specifically the following changes are proposed:

- 7.7(d) Imposes a limitation on the purposes for which an Ombudsman may access confidential data to be related to a specific complaint.
- 7.7(e) Requires NEMMCO to notify the relevant Code Participant of any information requested by an Ombudsman under clause 7.7(d) and, if it is requested by that Code Participant, supply the Code Participant with a copy of any information provided to the Ombudsman.
- 7.7(f) Provides for NEMMCO and ANZEWON members to consult on procedures for the efficient management of timely access to data by Ombudsman in consultation with Code participants in accordance with the Code consultation procedures.
- 8.6.2 Establishes the status of Ombudsmen to access information held by NEMMCO when investigating a complaint made by a customer against a Code participant.
- 8.6.3 Extends the requirement that third parties be required to safeguard confidential information to include Ombudsmen.

4.2 Issues for the Commission

The Commission primarily considered whether the proposed changes satisfy the statutory test outlined in section 2. That is, it considered whether the proposed changes will result in a public benefit that would outweigh any corresponding public detriment resulting from a lessening of competition.

4.3 What the applicant says

NECA states that the role of the Ombudsman is vital to protecting the interests of customers in the NEM. NECA submitted that it is crucial that the Ombudsman has rapid and unimpeded access to the appropriate information to allow the Ombudsman to fulfill its functions.

NECA also stated that of the eight parties that made submissions to the Code Change Panel, only two opposed the proposal outright. In relation to the submissions that suggested amendments to the draft Code Change, those amendments have been incorporated to restrict NEMMCO's ability to distribute data only in regards to specific complaints.

4.4 Submissions from interested parties

The Commission received two submissions, from Energex Retail and from Ergon Energy.

Energex opposed the proposed changes arguing three main points:

- As the Ombudsman schemes already allow for the Ombudsman to request information from Code Participants, any problems with that system should be remedied within the Ombudsman schemes themselves rather than through alteration of the Code
- Allowing non-market participants wider access to commercially sensitive material is questionable. Further if direct access is granted to the Ombudsman, then it is foreseeable that other jurisdictional bodies may seek this access.
- The design of the NEMMCO MSATS network was not intended for the sort of direct access sought by the Ombudsman.

Ergon also opposed the proposed changes arguing the following:

- Each Code Participant has privacy obligations and has discretion to release information, sought on a case by case basis, where it would not compromise those obligations. Removing the Code participants' discretion may affect their ability to fulfill privacy obligations.
- It is inefficient for NEMMCO to provide first tier customer data to an Ombudsman, when NEMMCO do not have that data and must seek it from the Code participant.
- It is unnecessary to change the Code when due to the various Ombudsman schemes, the Ombudsman can already request any information relevant to a complaint.

4.5 Commission's considerations

The Commission considered that it is important to have in place an effective and efficient Ombudsman scheme for the resolution of customer-related complaints in all regions of the NEM. The Commission agrees with NECA's submission that direct access to MSATS information would allow the Ombudsman to provide consumers with better service and quicker resolution of complaints.

In relation to the changes to chapter 8 of the Code, the Commission considers it appropriate for the Ombudsman to be included in the list of bodies authorised to receive confidential information (including MSATS information), subject to the limitations proposed in chapter 7 of the Code.

The Commission understands that many of the Ombudsman’s investigations seek to clarify whether a Code Participant has fulfilled its obligations in recording information about customer transfers in the MSATS database. For example, following the transfer of a customer from one retailer to another under Full Retail Competition (FRC), disputes can arise where it is unclear which retailer “owns” a particular customer. In such cases, the Ombudsman would wish to determine the details of the customer transfer through the records contained in MSATS. The proposed code changes would facilitate this. The Commission also understands that the data that the Ombudsman would request from NEMMCO would concern the procedures undertaken by Code Participants in recording customer transfer data, and would not seek to identify the quantity of energy supplied by a Code Participant to its customers or other commercially sensitive information.

Ergon submits that the proposed code changes would enable the Ombudsman to directly access second-tier customer data through NEMMCO, but that NEMMCO does not have direct access to first tier customer data.¹ The Ombudsman would consequently seek the information directly from the first-tier retailer. Ergon submits that this favours first-tier retailers above second-tier retailers, particularly with respect to the management of their obligations under the *Privacy Act 1988*. Ergon is also concerned that this will increase the time and expense required to extract the relevant information for investigating complaints.

The Commission understands that under the various Ombudsman schemes that are currently in place, the procedures for the provision of information are the same for all Code Participants, but that ultimately, the Ombudsman can compel a Code Participant to provide the information that it requires to investigate a complaint. The Commission also recognises that, in contrast, the proposed code changes may enable a first-tier retailer to have more control over the provision of information to the Ombudsman.

However, in relation to the changes proposed to chapter 7 of the Code, the Commission considers it appropriate that the Ombudsman is limited to receiving confidential information only in relation to specific complaints. Further, it is appropriate that on requesting such information from NEMMCO, the Ombudsman would notify the relevant Code Participant of that request and supply that Code Participant with a copy of the information received. Therefore, with regard to Ergon’s first point, the Commission considers that the proposed chapter 7 provisions can mitigate any imbalance in the access and use of MSATS data. Furthermore, the proposed amendments only provide the Ombudsman direct access in relation to specific disputes and only for the purposes outlined in clause 8.6.1 of Code. The confidentiality of the

¹ A first-tier customer is one that is currently supplied by its *Local Retailer*, that is, the incumbent retailer assigned to that customer before the introduction of FRC. By contrast, a second-tier customer is one that has chosen to switch to a new retailer under FRC.

information must be taken into account by the Ombudsman and it must take all precautions necessary to protect the confidentiality of that information.

With regard to Ergon's concern that the code changes will increase the time and expense taken to extract the relevant first-tier data, the Commission notes that the proposed changes place a requirement on both NEMMCO and the Ombudsman to jointly develop a set of procedures for the efficient implementation of the arrangements for access to MSATS data. After conferring with NEMMCO, the Commission is satisfied that the use of the access arrangements will lead to greater efficiency, as well as decreased costs in providing information to the Ombudsman and resolving complaints.

Accordingly, the Commission considers that the Code changes are likely to provide for increased efficiency in the resolution of disputes. This is particularly beneficial to the ongoing transition to FRC in the NEM. The Commission also considers that anti-competitive detriment arising from these code changes is unlikely.

For these reasons the Commission considers that the arrangements and set out in the proposed code changes 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; and
- 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 grants authorisation to applications A40083, A40084 and A40085.

5. Determination

On 27 March 2003, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A40083, A40084 and A40085) of amendments to the National Electricity Code (Code). The applications were submitted by the National Electricity Code Administrator (NECA).

The changes amend chapters 7 and 8 of the Code to include the following provisions:

7. Metering

7.7 Rights of Access to Data

- (a) The only persons entitled to have either direct or remote access to *metering data* from a *metering installation*, the *metering database* or the *metering register* in relation to a *connection point* are:
- (1) *Code Participants* whose *NEMMCO* account statement relates to *energy* flowing through that *connection point*;
 - (2) the *Metering Provider(s)* who has an agreement to service the *metering installation*, in which case access is to be restricted only to allow authorised work;
 - (3) the *Network Service Providers* associated with the *connection point*;
 - (4) *NEMMCO* and *NECA* and its authorised agents; and
 - (5) any *Customer* who is registered with *NEMMCO* and who purchases electricity at the associated *connection point*.
- (b) Electronic access to *metering data* from a *metering installation* shall only be provided where passwords in accordance with clause 7.8.2 are allocated, otherwise access to *metering data* shall be from the *metering database*.
- (c) The *responsible person* must ensure that access to *metering data* from the *metering installation* by persons referred to in clause 7.7(a) is scheduled appropriately to ensure that congestion does not occur.
- (d) Despite anything to the contrary in this clause 7.7 and subject to clause 8.6, *NEMMCO* may provide *metering data* relating to a *Code Participant* from a *metering installation*, the *metering database* or the *metering register* to an Ombudsman acting under a duly constituted industry dispute resolution Ombudsman scheme of which the *Code Participant* is a participant, if the Ombudsman has requested the data for the purpose of carrying out a function of that scheme in respect of a complaint made by a customer of the *Code Participant* against that *Code Participant* under that scheme.

- (e) *NEMMCO* must notify the relevant *Code Participant* of any information requested by an Ombudsman under clause 7.7(d) and, if it is requested by that *Code Participant*, supply the *Code Participant* with a copy of any information provided to the Ombudsman.
- (f) *NEMMCO* must, acting jointly with industry Ombudsmen, develop procedures for the efficient management of timely access to data by Ombudsmen in consultation with *Code Participants* in accordance with the *Code consultation procedures*.

8. Administrative Functions

8.6 Confidentiality

8.6.2 Exceptions

This clause 8.6 does not prevent:

- (a) **(public domain)**: the disclosure, use or reproduction of information if the relevant information is at the time generally and publicly available other than as a result of breach of confidence by the *Code Participant* who wishes to disclose, use or reproduce the information or any person to whom the *Code Participant* has disclosed the information;
- (b) **(employees and advisers)**: the disclosure of information by a *Code Participant* or the *Code Participant's Disclosees* to:

- (1) an employee or officer of the *Code Participant* or a *related body corporate* of the *Code Participant*; or
- (2) a legal or other professional adviser, auditor or other consultant (in this clause called "*Consultants*") of the *Code Participant*, which require the information for the purposes of the *Code*, or for the purpose of advising the *Code Participant* or the *Code Participant's Disclosee* in relation thereto;

- (c) **(consent)**: the disclosure, use or reproduction of information with the consent of the person or persons who provided the relevant information under the *Code*;

- (d) **(law)**: the disclosure, use or reproduction of information to the extent required by law or by a lawful requirement of:

- (1) any government or governmental body, authority or agency having jurisdiction over a *Code Participant* or its *related bodies corporate*; or
- (2) any stock exchange having jurisdiction over a *Code Participant* or its *related bodies corporate*;

- (d1) **(ombudsman scheme)**: the disclosure, use or reproduction of information, but not *end-use consumer* information, if required by an ombudsman acting under a

duly constituted industry dispute resolution ombudsman scheme of which a *Code Participant* is a participant, for the purpose of carrying out a function of that scheme in respect of a complaint made by a customer of the *Code Participant* against a *Code Participant* under that scheme;

- (e) **(disputes)**: the disclosure, use or reproduction of information if required in connection with legal proceedings, arbitration, expert determination or other dispute resolution mechanism relating to the *Code*, or for the purpose of advising a person in relation thereto;
- (f) **(trivial)**: the disclosure, use or reproduction of information which is trivial in nature;
- (g) **(safety)**: the disclosure of information if required to protect the safety of personnel or equipment;
- (h) **(potential investment)**: the disclosure, use or reproduction of information by or on behalf of a *Code Participant* to the extent reasonably required in connection with the *Code Participant's* financing arrangements, investment in that *Code Participant* or a disposal of that *Code Participant's* assets;
- (i) **(regulator)**: the disclosure of information to the *ACCC* or any other regulatory authority having jurisdiction over a *Code Participant*, pursuant to this *Code* or otherwise;
- (j) **(reports)**: the disclosure, use or reproduction of information of an historical nature in connection with the preparation and giving of reports under the *Code*;
- (k) **(aggregate sum)**: the disclosure, use or reproduction of information as an unidentifiable component of an aggregate sum; or
- (l) **(profile)**: the publication of the *profile*.

8.6.3 Conditions

In the case of a disclosure under clause 8.6.2(b), 8.6.2(d1) or 8.6.2(h), prior to making the disclosure the *Code Participant* who wishes to make the disclosure must inform the proposed recipient of the confidentiality of the information and must take appropriate precautions to ensure that the recipient keeps the information confidential in accordance with the provisions of this clause 8.6 and does not use the information for any purpose other than that permitted under clause 8.6.1.

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; and
- 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 grants authorisation to applications A40083, A40084 and A40085.

Appendix A – Submissions to the Commission

The Commission received submissions from the following parties:

- Energex Retail Pty Ltd; and
- Ergon Energy Pty Ltd.