

Draft
Determination

Applications for Authorisation

Amendments to the National Electricity Code

Connection Point Responsibility

10 September 2003

Authorisation Nos:

A90873

A90874

A90875

Commissioners

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Glossary

code	National Electricity Code
Commission	Australian Competition and Consumer Commission
LNSP	Local Network Service Provider
MNSP	Market Network Service Provider
MSATS	Market settlement and transfer procedures
NSP	Network Service Provider
NMI	National Metering Identifier
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
NRF	National Retailers' Forum
TNSP	Transmission Network Service Provider
TPA	<i>Trade Practices Act 1974</i>

1. Introduction

On 23 June 2003, the Commission received applications for authorisation (Nos A90873, A90874 and A90875) of amendments to the National Electricity Code (code).

The proposed changes to the code relate to the clarification of responsibilities of the local network service provider or alternate contracted retailer when new customers are registered with NEMMCO. The proposed changes further identify that it is the responsible person's responsibility to register the new connection point with NEMMCO.

The proposed code changes relate to changes to the market rules that evolved from proposals originally put forward by the National Retailers' forum aimed at:

- Further developing and enhancing connection point responsibility and enhancing relevant metering obligations;
- Creating deemed connection point responsibility: and
- Allowing for adjustments and revised settlement statements.

NECA's recommended changes limit the application of the changes to market customers and shift the emphasis onto clarifying the market settlement and transfer (MSATS) procedures.

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 draft determination outlining its analysis and views on the applications for authorisation of the technical standards 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;
- 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 initial applications for authorisation of the changes to the code on 23 June 2003. Notification of the applications and a request for submissions was advertised in the *Australian Financial Review* on 2 July 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.

One submission was received from United Energy. The submission has been placed on the Commission's public register.

The Commission has produced this draft determination outlining its analysis and views on the changes according to the statutory assessment criteria set out in chapter 2. The Commission invites the applicant and other interested persons to notify it of 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 **10 September 2003** that it wants the Commission to hold a conference, the Commission will hold a conference 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 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. Connection Point Responsibility

4.1 Background

On 23 June 2003, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A90873, A90874, and A98075) from NECA. These applications relate to changes to the market rules that evolved from proposals originally put forward by the National Retailers' Forum aimed at:

- Further developing and enhancing connection point responsibility and enhancing relevant metering obligations;
- Creating deemed connection point responsibility; and
- Allowing for adjustments and revised settlement statements.

NECA's recommended changes limit the application of the changes to market customers and shift the emphasis onto clarifying the MSATS procedures.

The proposed changes to the market rules are in response to actual events in the market and are intended to ensure that a local retailer cannot become liable to pay NEMMCO for electricity consumed by another contestable retailer's customer.

Scenario submitted by the National Retailers' Forum (NRF) to support the proposed code changes:

- The occupant of a newly completed building entered into a supply contract with a retailer, not the local retailer for the distribution network. The site was projected to consume greater than 160 MWh/year and therefore was contestable within the jurisdiction rules for contestability at that time.
- The contracted retailer (second tier retailer) assumed the role of responsible person and engaged a metering provider, who installed a new meter at the site. The site was connected to the local distribution network. A National Metering Identifier (NMI) was not obtained for the connection point from the TNSP and the connection point was not registered with NEMMCO.
- During the period of the contract between the second tier retailer and the building occupant, the meter was never read; no bills were rendered by the second tier retailer for energy usage or by the LNSP for network usage.
- The Local Network Service Provider (LNSP) is the designated service provider unless a contestable customer chooses a contracted (second tier) retailer.
- It appears that the local retailer may not have known of this new connection point and has not billed the customer, but the local retailer will have paid for the energy supplied through the transmission connection point charges.
- This scenario continued for a period of more than one year.

4.2 Issues for the Commission

In the consideration of the of the proposed code changes the Commission must determine whether the benefit of the proposed code change outweighs any potential anti-competitive detriment:

- Currently the code is unclear on the precise definition in regard to who is deemed to be the financially responsible person in terms of connection for a customer in a contestable market.
- NECA's proposal is an attempt to clarify the issue of whether a second tier retailer or a LNSP is financially liable for electricity consumed by a contestable customer when a dispute arises.

4.3 What the applicant says

In documentation provided by NECA to the Commission, NECA and the NRF identify that the proposed code changes should:

Further develop and enhance connection point responsibility and metering obligations;

- Create deemed connection point responsibility; and
- Allow for adjustments and revised settlement statements.

The proposed changes are in response to actual market events and are intended to ensure that a local retailer cannot become liable to pay NEMMCO for electricity consumed by another contestable retailer's customer.

The original code changes proposed by the NRF were modified after NECA consulted with industry participants. The code changes relate to the following sections:

Clause	Description
3.15.3(a)	Clause added to make the identity of the financially responsible market participant consistent with the Market Settlement and Transfer Procedures
3.15.18(b1)	New clause inserted to enable a market participant adversely affected by settlement error to initiate a dispute if unable to recover amounts owed by the amendment of settlement by NEMMCO.
3.15.18(c)	Clause amended to make clear that only disputes raised by NEMMCO or with NEMMCO are required to be issued in the form specified by this clause – other disputes are in accordance with the chapter 8 provisions.
7.2.7(a)	Amended to enable NEMMCO to consult on revised procedures to overcome deficiencies with current metering and registration process.
7.2.8(c)	<p>Amended to specify that the MSATS procedures must establish the administrative processes and procedures which must be carried out by Code participants and metering providers to meet their code obligations in relation to support of retail competition including, but not limited to:</p> <ul style="list-style-type: none"> (i) recording the responsible person, financially responsible market participant and metering provider for each connection point; (ii) recording in accordance with clause 7.3(db) the National Metering Identifier for each connection point; (iii) maintaining the recorded information referred to in clause 7.2.8(c)(i) and 7.2.8(c)(ii), and providing suitable agreements for access to this recorded information; and (iv) processes for the transfer of connection points from one Financially Responsible market Participant to another, including any associated classification of the market load at that connection point; and <p>Processes for the transfer of connection points from one service provider (whether the service provider is a metering provider or an agency collecting data on behalf of NEMMCO) to another service provider, including any required changes to the metering installation.</p>
7.2.8(d)	Redundant words deleted
7.3.1(db)	Amended to make clear that the responsible person must follow the procedures in registering the details of metering installation.
Glossary	Definition of Market Settlement and Transfer procedures.

4.4 What the interested parties say

United Energy provided a submission to the Commission regarding the connection point responsibility code changes. The submission highlights the following issues in regard to the proposed code changes:

- It does not provide any additional protection to the distributor; and
- The consultation process by NECA in regard to the proposed code changes did not include United Energy.

In its submission United Energy also provides specific comment regarding the proposed code changes:

Clause	Comment
Clause 7.2.7	It is difficult from the information provided to understand why there is a need for this amendment and whether allied procedures may extend past the current relevant procedures of market settlement and transfer procedures and NMI Procedures etc or whether further layers of regulatory procedures may be imposed.
Clause 7.2.8 (c) ‘...to meet their code obligations in relation to support of retail competition including, but not limited to...’	United Energy concern is in regard to the meaning of the phrase ‘support of retail competition’. As it is an open ended clause, United Energy highlights that this may have the potential to lead to inconsistencies between the NEC and jurisdictional regulators.
Clause 7.3.1 (db)	<p>The concerns that United Energy raises in regard to the changes to this clause are that:</p> <ul style="list-style-type: none"> ▪ It suggests that the responsible market participants as provided for in the Market Settlement and Transfer solution procedures must register the NMI with NEMMCO. ▪ While this consistent with other clauses in the NEC, the Market Settlement and Transfer procedures in clause 2.4 9(a) refer to the LNSP creating the NMI master record.

4.5 Commission's considerations

The code changes were originally proposed by retailers in response to actual market events where it was unclear whether the LNSP or an alternate contracted retailer was responsible for registering a connection point (NMI) with NEMMCO. The proposed changes further clarify that the contracted retailer is financially liable for power consumed through a connection point and that the contracted retailer is responsible for registering a connection point with NEMMCO.

The Commission considers that the proposed code changes will promote transparency regarding the clarification of disputes between second tier (contracted) retailers and LNSP's. These disputes have arisen as a result of the current inconsistencies with the identification of the financially responsible person in the code and market participant in the market settlement transfer procedures.

The proposed change to clause 3.15.3(a) and 3.15.18(b)(1) should enhance the identification of the financially responsible market participant. It should also enable a market participant which is adversely affected by settlement error to initiate a dispute if unable to recover amounts owed by the amendment of the settlement to NEMMCO.

The primary concern that United Energy expresses in its submission is that the proposed code changes do not provide additional protection for distributors. The submission also makes direct comment regarding the specific code changes.

In its submission United Energy also notes that clause 7.3.1 (db) suggests that the responsible person as provided for in the market settlement and transfer solution procedures must register the NMI with NEMMCO. NECA is of the view that this approach is consistent with the MSATS procedures.

If a perceived need to review the MSATS procedures arises, NEMMCO must follow the normal code consultation procedures. The Commission considers that such a revision of these procedures is beyond the scope of the current applications and that changes to the procedures should properly be the result of industry consultation with NEMMCO.

The Commission acknowledges United Energy's concerns, however, it is of the view that it that the proposed code changes provide public benefits, by clarifying dispute settlement procedures in regard to connection point responsibility, and the changes will not have a detrimental impact on competition.

Conditions of Authorisation

The Commission proposes to grant authorisation of the code changes proposed subject to the following conditions:

Condition C1: Clause 3.15.18(b1) refers to the market Settlement and Transfer Solution system. The word 'system' has been mistakenly italicised in the current proposal.

Condition C2: Clause 3.15.18 (c) must be amended to ‘...on the day NEMMCO receives or issues the written notice of dispute’.

Condition C3: Clause 7.2.8(c)(ii) must be amended to change the reference ‘National Metering Identifier’ to ‘NMI, National Metering Identifier’.

5. Determination

On 23 June 2003, the Australian Competition and Consumer Commission (Commission) received applications for authorisation (Nos A90873, A90874 and A90875) of amendments to the National Electricity Code. The applications were submitted by the National Electricity Code Administrator.

The proposed code changes relate to changes to the market rules that evolved from proposals originally put forward by the National Retailers' forum aimed at:

- Further developing and enhancing connection point responsibility and enhancing relevant metering obligations;
- Creating deemed connection point responsibility; and
- Allowing for adjustments and revised settlement statements.

NECA's recommended changes limit the application of the changes to market customers and shift the emphasis onto clarifying the market settlement and transfer procedures.

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 and subject to the following conditions of authorisation that are requested pursuant to section 90A of the TPA, to grant authorisation to applications A90873, A90874 and A90875.

Conditions of Authorisation

The Commission proposes to grant authorisation of the code changes proposed subject to the following conditions:

Condition C1: Clause 3.15.18(b1) refers to the market Settlement and Transfer Solution system. The word ‘system’ has been mistakenly italicised in the current proposal.

Condition C2: Clause 3.15.18 (c) must be amended to ‘...on the day NEMMCO receives or issues the written notice of dispute’.

Condition C3: Clause 7.2.8(c)(ii) must be amended to change the reference ‘National Metering Identifier’ to ‘NMI, National Metering Identifier’.

Appendix A – Submissions to the Commission

The Commission received submissions from the following parties:

- United Energy