

# **Draft Determination**

## **Applications for Authorisation**

### **National Electricity Code Introduction of the Goods and Services Tax**

**Date: 1 November 2000**

**Authorisation nos:**

A90735  
A90736  
A90737

**Commissioners:**

Asher  
Shogren  
Cousins  
Martin

**File no:**

C2000/1111



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## **Glossary**

Code	National Electricity Code
Commission	Australian Competition and Consumer Commission
GST	Goods and services tax
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
TPA	Trade Practices Act 1974

# 1 Introduction

On 15 June 2000, the National Electricity Code Administrator (NECA) requested authorisation of amendments to the National Electricity Code (Code) - application numbers A90735, A90736 and A90737 - to accommodate the introduction of the Goods and Services Tax (GST) from 1 July 2000. The Australian Competition and Consumer Commission (Commission) granted interim authorisation to these amendments on 21 June 2000.

The proposed Code changes specify the treatment of GST for the purpose of quoting prices within the National Electricity Market (NEM) and for settlement residue auctions. The changes also stipulate the obligations of NEM participants and the National Electricity Market Management Company (NEMMCO) for the collection of the GST.

The proposed Code changes insert clause 3.15.11A into the Code. This clause:

- identifies those items in the Code that are quoted without any allowance for GST. Basically, all prices, fees, charges and amounts payable to or by NEMMCO or NECA in respect of taxable supplies under the Code will be priced to exclude GST;
- requires Code participants and NECA to include the amount for GST in any payments made to another Code participant for taxable supply; and
- requires NEMMCO to include the amounts for GST in settlements statements.

The application also amends clause 3.15.19 to allow NEMMCO to issue revised settlements statements if the GST law or its interpretation is altered.

## 2 Statutory test

The applications were made under sub-sections 88(1) and 88(8) of the *Trade Practices Act 1974* (TPA). Applications under sub-section 88(1) are for the 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. 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.

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.

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 subject arrangements 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 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.

In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements, the public benefits arising from the arrangements and then weigh the two to determine which is the greater. Should the public benefit or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.

If that is not the case the Commission may refuse authorisation or alternatively, in refusing authorisation, indicate to the applicant how the applications could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.

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. However, authorisation only provides exemption for the particular conduct applied for. Authorisation does not provide blanket exemption from all provisions of the TPA.

### 3 Public consultations

On 15 June 2000, NECA lodged applications for authorisation of amendments to the Code with the Commission.

The Commission commenced its public consultation process by advertising a request for submissions on 7 July 2000 in *The Australian Financial Review*. Comments were invited concerning any public benefits and anti-competitive detriment that might arise out of the proposed Code changes. Interested parties were invited to contact the Commission for copies of the proposed amendments. The proposed Code changes were also made available on the Commission's website.

The Commission did not receive any submissions.

The Commission has produced this draft determination outlining its analysis and views on the Code changes according to the statutory assessment criteria set out in section 2. The Commission now invites the applicant and other interested persons to notify it within 14 days of 3 November 2000 as to whether the applicant or other interested persons wish the Commission to hold a conference in relation to this draft determination.

If the applicant or an interested party notifies the Commission in writing within the 14 days that they want the Commission to hold a conference, then it is proposed that the conference will be held on Tuesday 28<sup>th</sup> November 2000 in the Commission's offices in Canberra. 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.

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.

## 4 Public benefit

### 4.1 The applicant's claims

The applicant claims that the amendments are necessary and appropriate to accommodate the introduction of the GST. The application relates only to the GST Code changes and not to the Code as a whole.

The applicant claims that no substantive issues were raised when it conducted its public consultations on the proposed Code changes.

### 4.2 Commission considerations

The Commission considers that the proposed amendments do not impact on competitive outcomes in the NEM.

However, the Commission considers that a well drafted Code, which facilitates compliance with the New Tax System legislation, will contribute to the public benefit arising from the NEM. The Commission considers that the operation of the NEM as a GST exclusive market will result in greater administrative simplicity in both the NEM and derivative financial markets. Further, the operation of the NEM as a GST exclusive market is in line with the Commission's GST guidelines, referring to both wholesale pricing and the conduct of auctions.<sup>1</sup>

In clarifying how the New Tax System charges are going to be dealt with in the NEM, the Code changes should avoid the confusion of some participants charging GST exclusive, and some GST inclusive prices. In doing so, the Code changes should promote a more efficient operating environment.

The Commission also notes two drafting errors. Following consultation with NECA, it was decided that the proposed amendments be changed as per conditions C4.2 and C4.3, below. Applying these conditions will reflect the applicant's intended Code amendments.

#### *Conditions of authorisation*

**C4.1 Clause 3.15.11A(b) must be amended by deleting the words 'but subject to clause 3.15.11A(d)'.**

**C4.2 The second of the two paragraphs numbered as '3.15.11A(b)(2)' should be re-numbered to read '3.15.11A(b)(3)'.**

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<sup>1</sup> Price exploitation and the new tax system, general principles, information and guidelines on when prices contravene section 75AU of the Trade Practices Act 1974, Australian Competition and Consumer Commission, March 2000.

## **5 Anti-competitive detriment**

### **5.1 The applicant's claims**

The applicant claims that the application of the GST to the various fees and charges specified by the amendments, is unlikely to be held to be:

- a contract, arrangement or understanding that restricts dealings or affects competition;
- exclusive dealing; or
- an exclusionary provision.

Regardless, the applicant has sought authorisation to remove the risk of prosecution under the anti-competitive conduct provisions of the TPA, for behaviour engaged in under these Code amendments.

### **5.2. Commission considerations**

The list of fees, charges and amounts payable to or by NEMMCO includes items that may be considered to be anti-competitive. For example, the Commission previously noted that the spot price determination in the NEM could be considered to be a price fixing provision. However, the Commission authorised the spot pricing arrangements in its determinations of 10 December 1997 and 22 December 1999. The current application merely extends this same agreement on the pricing mechanism to incorporate the GST.

The Commission considers that all of the proposed GST amendments extend existing arrangements regarding the determination and dissemination of prices to incorporate the GST, and do not introduce any additional anti-competitive detriment beyond those which may exist with the status quo.

## **6 Balance of public benefits and anti-competitive detriment**

The Commission considers that, subject to the conditions imposed, the introduction of the proposed GST Code changes will result in a benefit to the public in that the changes will facilitate compliance with the new tax system, and support the ongoing orderly conduct of the NEM.

The Commission's earlier determinations on the Code have found that there is a benefit to the public that outweighs any anti competitive detriment arising from the NEM arrangements, or that there is a benefit such that the arrangements should be allowed.

Hence, the Commission considers that, subject to the conditions imposed, the introduction of the proposed GST Code changes will result in a benefit to the public that will outweigh any anti-competitive detriment. Further the Commission is satisfied that the public benefit is such that the proposed arrangements should be allowed to go ahead.

## 7 Draft Determination

For the reasons outlined in section 6 of this draft determination and after consideration of the issues raised in the application, the Commission concludes that, subject to the conditions below, in all circumstances the proposed amendments to the Code:

- 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.

Consequently, the Commission proposes, subject to any pre-determination conference requested pursuant to s. 90A of the TPA, to authorise the amendments to the Code subject to the conditions below.

### *Conditions of authorisation*

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