

Determination

Applications for Authorisation

Amendments to the National Electricity Code

Connection Point Responsibility

19 November 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) from the National Electricity Code Administrator (NECA).

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 the National Electricity Market Management Company (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 (NRF) 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 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 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 produced a draft determination outlining its analysis and views on the changes according to the statutory assessment criteria set out in chapter 2. Following the release of the draft determination on 10 September 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. However, on 31 October 2003, NECA lodged a submission which suggested minor amendments to the conditions of authorisation outlined in the draft determination.

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

4. Connection Point Responsibility

4.1 Background

The applications for authorisation 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.

The scenario submitted by the NRF to support the proposed changes highlights an actual market event where a contestable customer registers with a contracted retailer for the supply of electricity and the connection point is not registered. The scenario identifies that the contracted retailer assumed the role of responsible person, who installed a new meter at the site. The site was connected to the local distribution network. The connection point was not registered with NEMMCO and a National Metering Identifier (NMI) was not obtained. During the period no bills were rendered by the contracted retailer for energy usage or the Local Network Service Provider (LNSP) for network usage. Over the course of approximately a year the LNSP would have paid for energy supplied through the transmission connection point charges.

4.2 Issues for the Commission

In the consideration of the proposed code changes the Commission must determine whether the benefit of the proposed code changes 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

NECA argues 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 intended to ensure that a local retailer cannot become liable to pay NEMMCO for electricity consumed by another contestable retailer's customer.

4.4 What the interested parties say

United Energy argued that the proposed code changes do not provide any additional protection to the distributor. It also noted that NECA's consultation process in regard to the proposed code changes did not include United Energy.

4.5 Issues arising from the draft determination

In the draft determination, the Commission proposed to grant authorisation to the code changes subject to certain conditions being met. Subsequently, on 31 October 2003, NECA provided the Commission with a submission on the draft determination. NECA agrees with the overall intent of the conditions of authorisation but suggests that minor amendments should be made to the conditions of authorisation to better align the changes with the overall intent of the proposals.

4.6 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 LNSPs. 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) 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 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.

With regard to NECA's submission concerning the draft determination, the Commission accepts that NECA's suggested amendments would improve the clarity of the conditions. This will help align the drafting of the code changes with their intent.

The Commission therefore grants authorisation to the proposed code changes subject to the following conditions.

Conditions of Authorisation

Condition C1: Clause 3.15.3 (a)(4) must be amended to remove the italicised word 'system'.

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: The references to National Metering Identifier in clause 7.2.8(c)(ii) and NMI in the Glossary must be amended to be consistent.

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 Section 4 of this determination, the Commission is satisfied that, in all the circumstances [and subject to the conditions set out below], the making and giving effect to the proposed amendments to the National Electricity Code for which authorisation is sought under subsection 88(1) and 88(8) of the TPA:

- 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 result, or be likely to result, from the proposed amendments.

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 made and given effect to.

The Commission therefore grants authorisation to applications A90873, A90874 and A90875 subject to the following conditions.

Conditions of Authorisation

Condition C1: Clause 3.15.3 (a)(4) must be amended to remove the italicised word ‘system’.

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: The references to National Metering Identifier in clause 7.2.8(c)(ii) and NMI in the Glossary must be amended to be consistent.