

Applications for Authorisation

Amendments to the National Electricity Code

Inter-regional settlements agreements

3 March 2004

Authorisation Nos:

A90889

A90890

A90891

File no: C2003/1634

Commissioners:

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Glossary

ACCC	Australian Competition and Consumer Commission
code	National Electricity Code
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
customer	Transmission Customer
TNSP	Transmission Network Service Provider
TUOS	Transmission Use of System
TPA	<i>Trade Practices Act 1974</i>

1. Introduction

On 16 December 2003, the Australian Competition and Consumer Commission (ACCC) received applications for authorisation (Nos A90889, A90890 and A90891) of amendments to the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA).

The amendments seek an extension to the provisions of clause 3.6.5. These provisions relate to paying an importing region the relevant settlements residue¹ auction proceeds on the basis that the importing region makes negotiated payments to the exporting region for use of its network assets.

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 ACCC concludes that the public benefits of the arrangements or conduct would outweigh the anti-competitive detriment of such arrangements or conduct.

The ACCC has prepared this draft determination outlining its analysis and views on the applications for authorisation of the inter-regional settlements agreements amendments to the code.

Chapter 2 of this draft determination sets out the statutory test that the ACCC must apply when assessing an application for authorisation. Chapter 3 contains an outline of the ACCC's public consultation process. The ACCC's analysis of the proposed changes is set out in chapter 4 and the ACCC's draft determination is in chapter 5.

¹ Inter-regional settlements residue arise because transmission losses and constraints on interconnections create a mismatch between the monies received from market customers and those paid to generators as a result of the National Electricity Market settlements process.

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 ACCC 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 ACCC 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 ACCC 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 TPA specifies that the detriment to be considered is limited to detriment caused by a lessening of competition, however no such limitation is required when considering public benefits.

In considering whether or not to grant authorisation the ACCC 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 ACCC determines that the public benefits do not outweigh the detriment to the public constituted by any lessening of competition, the ACCC 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 ACCC 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 ACCC's authorisation process and the statutory test that the ACCC applies can be found in the *Guide to authorisations and notifications*, Australian Competition and Consumer Commission, November 1995.

3. Public consultation process

The ACCC has a statutory obligation under the TPA to follow a public process when assessing an application for authorisation.

The ACCC received the applications for authorisation of the changes to the code on 16 December 2003. Notification of the applications and a request for submissions was placed in *The Australian Financial Review* on 15 January 2004 and placed on the ACCC's web site. Although not required under the TPA, interested parties were asked to make submissions to the ACCC regarding their views on the issues of public benefit and anti-competitive detriment arising from implementation of the proposed changes. The ACCC received no submissions.

The ACCC has produced this draft determination outlining its analysis and views of the amendments to the code according to the statutory assessment criteria set out in chapter 2. The ACCC invites the applicant and other interested persons to notify whether the applicant or other interested persons wish the ACCC to hold a conference in relation to this draft determination.² Alternatively, the applicant or interested parties may make written submissions to the ACCC in relation to this draft determination. Written submissions must be received by Friday 19 March 2004.

If the applicant or an interested party notifies the ACCC in writing within 14 days of 3 March 2004 that it wants the ACCC to hold a conference, the ACCC will hold a conference in Canberra, 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 ACCC considers appropriate are entitled to participate in the conference.

Following the conference, the ACCC 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.

² For the purposes of the conference, an interested person is a person who has notified the ACCC 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 ACCC is of the opinion that the interest is real and substantial.

4. Inter-regional settlements agreements

4.1 Background

Transmission Use of System (TUOS) charges are payments made by transmission customers (customers) for the use of a Transmission Network Service Provider's (TNSP's) network. However, the provision of electricity by a TNSP to a customer may involve the use of the assets of a network in an adjacent region. Therefore, a proportion of a customer's TUOS charges should be allocated to the TNSP in the adjacent region.

The code, however, originally contained a moratorium on the payment of TUOS charges across regions until a national transmission pricing methodology was developed and implemented. The deferral of these inter-regional TUOS charges was offset by inclusion of provisions in clause 3.6.5 of the code. These provisions relate to paying an importing region the relevant settlements residue auction proceeds on the basis that the importing region makes negotiated payments to the exporting region for use of its network assets. Extensions of these provisions were previously authorised by the ACCC³, however they lapsed on 1 July 2003.

4.2 The application

In its application, NECA seeks to extend the provisions regarding the allocation of these settlement residues attributable to transmission assets in adjacent regions. The national transmission pricing methodology which was expected to be in place by 1 July 2003, has been delayed by the work of the Ministerial Council of Energy.

At this stage, the Victorian and South Australian Governments are the only jurisdictions who have implemented arrangements under these provisions. They recently renegotiated these arrangements regarding settlement residues, and due to the expiry of the sunset date of 1 July 2003, as specified in sub clause 3.6.5(a)(5)(ii), they are seeking these code changes to give effect to the renegotiated agreements.

4.3 Issues for the ACCC

In its earlier determinations, the ACCC considered that the public benefits were sufficient to outweigh any anti-competitive detriment that may have arisen when extending the provisions in clause 3.6.5 and allowing the moratorium on the transfer of inter-regional TUOS payments to continue. The ACCC must now assess whether the

³ Australian Competition and Consumer Commission, *Applications for Authorisation – Amendments to the National Electricity Code – Inter-regional transfer of TUOS, treatment of losses, improvements to PASA, pricing under extreme conditions, demand-side participation and end-user advocacy*, 19 September 2001 and Australian Competition and Consumer Commission, *Applications for Authorisation – Amendments to the National Electricity Code – Network pricing and market network service providers*, 21 September 2001.

public benefits continue to outweigh any anti-competitive detriment by the extension of the provisions submitted by the applicant.

4.4 What the interested parties say

The ACCC received no submissions.

4.5 What the applicant says

NECA states that the provisions in the code as they currently stand do not provide for any recognition of network costs in adjacent regions and will not do so for at least some time. In these circumstances, NECA accepts that it is better that some form of payment continue under these interim arrangements to reflect efficient use.

4.6 ACCC's considerations

Within its decision on inter-regional transfer of TUOS⁴, the ACCC considered that the extension of provisions in clause 3.6.5 would enable further time for a national transmission pricing methodology to be considered and, as such, improve the overall efficiency of the National Electricity Market (NEM). The ACCC also considered that there was a public benefit in allowing lead-time to facilitate this transition.

Within its decision on network pricing and market network service providers⁵, the ACCC referred to the review on NEM-wide general charges and considered that the review should take into account the treatment of inter-regional residues. Consequently, the ACCC considered that the expiry date of clause 3.6.5(a)(5)(ii) should be extended until 1 July 2003.

The ACCC continues to hold the view that it is preferable to review the treatment of inter-regional residues within the broader framework of a national transmission pricing methodology. Furthermore, the ACCC agrees that the arrangements as they stand are far from ideal. It is considered that an extension of expiry date until 1 July 2006 will provide further time for a national transmission pricing methodology to be considered, and simultaneously provide some recognition of network costs that arise in respect of inter-regional transmission.

The ACCC therefore considers that the provisions in clause 3.6.5(a)(5)(ii) should be extended until 1 July 2006.

⁴ Ibid.

⁵ Ibid.

5. Draft Determination

On 16 December 2003 the ACCC received applications for authorisation (Nos A90889, A90890 and A90891) of amendments to the code. The applications were submitted by NECA.

The amendments seek an extension to the provisions of clause 3.6.5. These provisions relate to paying an importing region the relevant settlements residue auction proceeds on the basis that the importing region makes negotiated payments to the exporting region for use of its network assets.

The applications were made under sub-sections 88 (1) and 88 (8) of 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)
- 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 4.6 of this draft determination, the ACCC is satisfied that, in all circumstances, the making and giving effect to the proposed amendments to the code for which the 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
- 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 ACCC 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 ACCC 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 ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to applications A90889, A90890 and A90891. The period of authorisation is to 31 December 2010.