

Draft Determination

Applications for Authorisation Amendments to the National Electricity Code – New South Wales Metering Derogations

Date: 1 December 2004

Authorisation Nos:

A90928
A90929
A90930

Commissioners

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Glossary

ACCC	Australian Competition and Consumer Commission
Code	National Electricity Code
Centurion	Centurion Metering Technologies
DEUS	NSW Department of Energy, Utilities and Sustainability
DNSP	Distribution Network Service Provider
DUoS	Distribution Use of System
ESC	Essential Services Commission (Victoria)
F.I.	Frequency Injection
First tier customer	End-use customers who consume electricity provided by the local or host retailer in that geographical area
FRC	Full Retail Competition
FRMP	Financially Responsible Market Participant
IPART	Independent Pricing and Regulatory Tribunal (NSW)
ICRC	Independent Competition and Regulatory Commission
Integral	Integral Energy Australia
LNSP	Local Network Service Provider (distributor)
MWh	Megawatt Hours
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
NSW	New South Wales
OTTER	Office of the Tasmanian Energy Regulator
QCA	Queensland Competition Authority
Responsible Person	The person who has responsibility for the provision of a metering installation for a particular connection point, being

either the Local Network Service Provider or the Market Participant as described in Chapter 7 of the Code

Second tier customer	End-use customers who consume electricity provided by a retailer other than by the local or host retailer in that geographical area
TPA	<i>Trade Practices Act 1974</i>
Type 5 meters	Manually read interval meters, capable of storing half hourly electricity consumption data
Type 6 meters	Basic or accumulation meters
Type 7 meters	Unmetered supplies (eg streetlights, telephone boxes)

1. Introduction

On 27 August 2004, the Australian Competition and Consumer Commission (ACCC) received applications for derogations (Nos A90928, A90929, and A90930) to the National Electricity Code (Code). These applications were lodged by the National Electricity Code Administrator (NECA) on behalf of the NSW Department of Energy, Utilities and Sustainability and the Minister for Energy and Utilities ('NSW' or 'DEUS').

The stated purpose of the applications for authorisation is to authorise derogations to the Code in relation to metering arrangements in Chapter 7 of the Code, and grant exclusivity for the provision of metering services for certain metering installation types by distribution businesses in New South Wales.

The applications also contained a request for interim authorisation of the derogations under section 91(2) of the *Trade Practices Act 1974* (TPA) pending the ACCC's Final Determination in respect of the derogations taking effect.

The applications for authorisation are in similar terms to previous derogations in relation to NSW's metering arrangements that were authorised by the ACCC on 23 January 2002. These derogations expired on 30 June 2004 and the substance of the current applications is to re-instate their operation until 31 December 2006.

NSW submits that:

- the substantial public benefits provided by the derogations;
- the jurisdictional consistency provided by extending the derogations;
- the public detriments that would result from the introduction of metering services competition without resolving technical co-ordination issues; and
- the need for unbundling pricing methodology before the introduction of metering services competition,

mean that the public benefits resulting from the proposed extension of the Chapter 9 derogations would outweigh any detriment to the public that may result from those amendments.

Authorisation under Part VII of the 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. Authorisation may be granted 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 the re-instatement of the derogations.

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. Chapter 4 sets out in detail the application for authorisation. The ACCC's analysis of the proposed extensions to the derogations is set out in chapter 5 and the ACCC's Draft Determination is in chapter 6.

2. Statutory test

The applications were made under sub-sections 88(1) and 88(8) of the Act.

Applications made under sub-section 88(1) of the Act 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 Act; 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 Act. 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 Act 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 Act. 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 Act 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 Act.

Sub-section 90(6) provides that the ACCC shall grant authorisation to arrangements with the purpose or affect of substantially lessening competition or exclusive dealing arrangements (other than third line forcing) 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 to exclusionary provisions or third line forcing arrangements 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 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, or that the public benefits likely to result from the proposed conduct or arrangements are not such that the proposed conduct or arrangements should be allowed, 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 Act. 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 Act. 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*, ACCC, November 1995.

3. Public consultation process

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

The ACCC received the applications for authorisation of amendments to the derogations on 27 August 2004. Notification of the applications and a request for submissions was provided through the ACCC's electronic communication service, and the applications were placed on the ACCC's web site. 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 extension of the existing derogations.

The ACCC received submissions from Centurion Metering Technologies Pty Ltd ("Centurion"), and Integral Energy Australia ("Integral").

The ACCC has prepared this Draft Determination outlining its analysis and views of the amendments to the derogations 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.¹

If the applicant or an interested party notifies the ACCC in writing by Friday 17 December 2004 that it wants the ACCC to hold a conference, the ACCC will hold a conference at the ACCC's Sydney office on Friday 14 January 2005.

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 any relevant issues raised and any related submissions, and issue a Final Determination. The closing date for submissions in relation to the Draft Determination is Friday 21 January 2004.

If no conference is called or written submissions received, then the Draft Determination will form the basis of 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 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. New South Wales Full Retail Competition Derogations

4.1 Background to the existing derogations

On 1 August 2001 the ACCC granted authorisation of Code changes that enabled Full Retail Competition (“FRC”) in the NEM (“FRC Code changes”).²

The ACCC’s authorisation of the FRC Code changes imposed conditions requiring the Jurisdictional Regulators to jointly review certain metering issues in the National Electricity Market and to assume the role of Metrology Co-ordinator in their respective jurisdictions.³ The Metrology Co-ordinator for each jurisdiction is responsible for developing a metrology procedure within that jurisdiction for metering installation types 5 and 6 and 7.⁴

Type 5 meters are manually read interval meters capable of reading and storing half-hourly electricity consumption. Type 6 meters are ‘basic’ or ‘accumulation’ meters. They do not provide time-of-use information and are read manually. Type 7 ‘meters’ relate to unmetered supply. Type 5 and 6 meters may be prepayment meters. A prepayment meter is a meter located at the customer’s premises that incorporates technology that relies generally on the prepayment of credit to supply electricity.

Metrology procedures contain information on the devices and processes that measure the flow of electricity and establish the rules, processes, algorithms and procedures necessary for the conversion of metering data (or relevant data in relation to unmetered loads) into a format suitable for wholesale market settlement.

4.2 New South Wales metering regulatory framework

The FRC Code changes authorised a set of provisions concerning the metering arrangements in the retail sector. The State jurisdictions individually pursued FRC derogations from those metering provisions. The existing New South Wales (“NSW”) derogations were authorised by the ACCC on 23 January 2002, and expired on 30 June 2004. The derogations grant exclusivity for the provision of metering services by distribution businesses in NSW for types 5-7 metering installations.

NSW has applied for authorisation to reinstate the derogations to the Code until 31 December 2006.

² ACCC, Final Determination, Full Retail Competition and Registration of Code Participants, 4 August 2001.

³ The jurisdictions that participated in the Review and their corresponding jurisdictional regulators are the ACT (ICRC), New South Wales (IPART), Queensland (QCA), South Australia (ESCOSA), Tasmania (OTTER) and Victoria (ESC).

⁴ Type 5 meters are manually read interval meters capable of reading and storing half-hourly electricity consumption. Type 6 meters are ‘basic’ or ‘accumulation’ meters. They do not provide time-of-use information and are read manually. Type 7 ‘meters’ relate to unmetered supply.

4.2.1 Joint Jurisdictional Regulators' Review

Under clause 7.13(f) of the Code, the Jurisdictional Regulators were responsible for conducting a Review to examine whether barriers exist to the adoption of economically efficient metering solutions, and, if so, to make recommendations about the reduction of those barriers.⁵ The Jurisdictional Regulators were required to review metering installation types 5 and 6, and consider options for developing nationally consistent metrology procedures. They were also required to review the effectiveness of the ringfencing arrangements for prescribed services and other services.

4.2.2 Summary of recommendations of the final report

For the purposes of this Draft Determination, the key recommendations of the Joint Jurisdictional Regulators' Review of Metering Types 5 & 6 and Metrology Procedures⁶ final report relate to the Responsible Persons for metering services for small customers.

Specifically, the report recommends that Chapter 7 of the Code be amended to give distributors permanent responsibility for metering services for "small" customers. These are defined as customers who consume less than a certain threshold ('z')⁷ and have a metering installation that does not meet the requirements of metering installation type 1 – 4. The final report also recommends that metering for all large customers, and/or those with a meter that meets the requirements of metering installation types 1 – 4, should be contestable. This is depicted in the following table:

Table 1: Responsibilities for metering services

	First and second tier customers
Competitive metering services	Subject to jurisdictional decision, customers that consume more than 'z' MWh per annum and/or customers that have a meter installed that meets the requirements of a metering installation type 1, 2, 3, or 4.
Distributor responsible	Customers that do not have a meter that meets the requirements of a metering installation type 1, 2, 3, or 4.

In summary, the Jurisdictional Regulators recommended that distributors should be responsible for metering services for all small first and second tier customers with a meter that does not meet the requirements of a metering installation type 1 – 4, and in the longer term, the Code should be changed to reflect this position. The report

⁵ The Terms of Reference for the Review appear in this paper as Appendix A.

⁶ See *Joint Jurisdictional Review of Metrology Procedures – Final Report*, October 2004, The Essential Services Commission, the Essential Services Commission of South Australia, the Independent Competition and Regulatory Commission (ACT), the Independent Pricing and Regulatory Tribunal (IPART), the Office of the Tasmanian Energy Regulator and the Queensland Competition Authority

⁷ The 'z' MWh per year consumption threshold is to be set by each jurisdiction.

recommends that a package of Code changes to Chapter 7 of the Code to bring the recommendations of the Review into effect be submitted to NECA by 31 December 2005. In the shorter term, this position should be reflected by extensions to the existing derogations. Additional recommendations included that meter charges should be unbundled from distribution use of system charges, and that there should be equitable metering arrangements for first and second tier customers.

Single metrology procedure

The Jurisdictional Regulators also made a number of other recommendations. Key recommendations include:

- that a single national Metrology Procedure should be developed to include technical metrology provisions for both first and second tier customers,
- that the Jurisdictional Regulators would remain responsible for developing key policy decisions underpinning the Metrology Procedure,
- that Chapter 7 of the Code should be amended to include first tier metering, and
- that the Code should be amended to give NEMMCO the responsibility for implementing the single national Metrology Procedure.

4.2.3 The NSW Accredited Service Provider Scheme

Currently in NSW, a category of metering services is already provided on a competitive basis. The Accredited Service Provider Scheme (ASP Scheme) allows for first-tier customers to contract directly with an Accredited Service Provider (ASP) for the installation of types 5 and 6 meters. The ASP, who may or may not be a subsidiary of an LNSP, is responsible for arranging for a new meter and connection to the local network.

This Scheme also covers second-tier customers, in so far as they are able to contract with an ASP for the installation and connection of a meter. However, other metering services in relation to that meter will be the responsibility of the LNSP.

4.3 Effect of the proposed New South Wales derogations

4.3.1 Responsible Person

Currently, clauses 7.2.2 and 7.2.3 of the Code specify that the distributor is the Responsible Person for metering installations within the distributor's local area, unless the Financially Responsible Market Participant (FRMP) *elects* to be responsible for a metering installation.

The effect of the NSW metering derogation in clause 9.17A is that distributors are exclusively responsible for providing metering services for customers with types 5-7 metering installations. However, second-tier customers with type 5 metering installations who consume more than 100 MWh per annum are not covered by the derogation.

From 1 July 2004, second-tier customers with types 6-7 metering installations and type 5 metering installations consuming less than 100MWh per year have ceased to be covered by derogations previously in force and the supply of meters and metering-related services to those customers is now deemed by the Code to be contestable, with a retailer having the option of becoming the Responsible Person for a relevant connection point.⁸ However, it should be noted that unless and until the retailer elects to become the Responsible Person the responsibility defaults to the distributor.

NSW now seeks to reinstate the derogations that were in force prior to 1 July 2004 for a transitional period. The proposed derogation would enshrine the distributor as the exclusive Responsible Person until 31 December 2006.

The derogations would also reinstate the requirement that the distributor provide metering services to retailers on a non-discriminatory, fair and reasonable basis, with any dispute about the fairness and reasonableness of the terms to be determined by IPART.

4.3.2 Payment for Metering

Clause 7.3.6(a) of the Code states that a FRMP for a connection point is responsible for all payment of costs associated with the provision, installation, maintenance, routine testing and inspection of the metering installation for that connection point. This is not limited to types 5, 6 and 7 metering installations.

Under the proposed derogations to the Code, costs incurred by the distributor as Responsible Person for most type 5, all type 6 and all type 7 metering installation may only be recovered in accordance with the distributor's licence conditions and other applicable regulatory instruments, which would include price determinations made by IPART.

4.4 Issues for the ACCC

When applying the statutory test, the ACCC must consider the potential public detriment that may arise from the proposed conduct.

The arrangements that provide distributors with exclusivity for the role of Responsible Person for metering installation types 5, 6 and 7 in their local area may: -

⁸ Clause 7.2.2 of the Code

1. amount to an exclusionary provision, as the arrangements have the effect of reducing the supply of metering services to electricity retailers by providers other than distributors for a particular connection point;
2. amount to a provision that substantially lessens competition, as the derogations may create a barrier to competition for the provision of meters and metering data services; and
3. amount to exclusive dealing, as the derogation requires electricity retailers to procure meters and metering data services from distributors for each connection point, to the exclusion of other potential suppliers.

4.5 Submission from the applicant

NSW contends that the introduction of customer choice in the provision of all metering services for small retail customers will create complexity and confusion that could endanger the success of the core FRC reforms.

Further, NSW contends that there are substantial public benefits provided by the derogations, in particular increased consistency across jurisdictions, as there are metering derogations in place in other NEM jurisdictions that have introduced FRC.

NSW also submit that the public detriment that would result from the introduction of metering services competition without resolving both technical co-ordination issues and the need for an unbundled pricing methodology would outweigh any benefit to the public that may result from metering services competition.

4.5.1 Public Benefits provided by the derogations

NSW contends that significant customer choice in the installation of metering installations has already been introduced in New South Wales through the ASP Scheme and that the ASP Scheme has been highly successful. NSW notes that all New South Wales LNSPs engage Metering Providers for metering services on a competitive tender basis through the Scheme, and claims that this process maintains downward pressure on Metering Provider costs.

NSW proposes to continue the current arrangements through the proposed derogation. It states that existing levels of competition, including metering competition for Type 5 customers that consume greater than 100MWh per annum, will be preserved.

NSW submits that to date, very few Type 5 customers that consume greater than 100MWh per annum and are eligible to choose their own Metering Provider have elected to do so. NSW argues that this fact demonstrates the limited benefit customers perceive from metering competition.

As such, NSW notes that many of the competitive benefits for the provision of these services have already been captured and therefore any potential public benefits

available through the implementation of metering contestability are substantially reduced.

4.5.2 Consistency provided by the derogations

NSW contends that the derogations will also have the effect of promoting consistency across jurisdictions in relation to regulation of the provision of metering services. NSW notes that Queensland and the Australian Capital Territory currently have derogations in place which are similar to the derogations requested in these applications, and Victoria has applied to extend similar derogations to 31 December 2006.

4.5.3 Technical Co-ordination issues in transition to metering competition

NSW argues that there are significant technical coordination issues that need to be resolved between Market Participants and NEMMCO before competition for the provision of metering services is introduced for meter types 5, 6 and 7 for small retail customers.

NSW states that the risks associated with introducing new systems specific to NSW over a short lead period are likely to have a negative impact on the overall success of metering competition. Ineffective transfer and concerns regarding supply failure would have the effect of undermining customer confidence in electricity retail contestability.

Therefore, NSW submits that delaying the introduction of full metering competition for small customers will allow time to enable resolution of these issues. NSW noted that details of these technical coordination issues have already been highlighted in the Victorian derogation applications.

The key areas of concern to NSW in this regard are as follows:

- load control activities;
- meter churn; and
- fault management and customer service standards.

Load Control

LNSPs utilise load control equipment that allows them to remotely switch off certain customers at peak demand times as an alternative to network augmentation. Customers subject to LNSP remote switch off are typically in the sub-40 MWh pa consumption category and are offered a lower tariff as compensation for their willingness to accept interruptions. The ACCC understands that in most cases, customers who agree to load control arrangements are those who have had new connections (for example for a new house), and who have installed off-peak hot water systems.

If a retailer can elect to be a Responsible Person, Metering Providers other than LNSPs or those directly engaged by LNSPs, will be able to provide meters for installation to such households. According to NSW, this would require the following issues to be addressed:

- Processes need to be determined to ensure that metering installations installed by metering service providers that are not subsidiaries of the LNSP comply with the requirements for LNSP “frequency injection” (“FI”) systems.
- Standards need to be established to ensure compatibility between distributors’ FI systems, meters and relays, with responsibility allocated to various parties for the satisfaction of these standards.
- A testing regime needs to be established to ensure compliance with the above standards.

Meter Churn

NSW submits that if meter provision is opened to competition, ‘meter churn’ may occur.

Meter churn occurs when a customer changes retailer and the previous retailer’s Metering Provider removes the installed meter and installs a new meter prior to supplying that customer. NSW claims that this could result in delays in the transfer process and inconvenience to the customer and lower customer service standards.

NSW submits that for most ‘smaller’ customers (i.e. those with below 100 amps, or ‘non-CT’ (current transfer) meters, which can be either type 5 or type 6 meters), it is not possible to change meters without interrupting supply in the interim and, given that two different Metering Providers could be involved in the meter replacement process, the customer may be left without power for long periods of time.

Further, as meters tend to have relatively long useful lives (over 20 years) meter churn could be regarded as a costly and wasteful by-product of the introduction of competition for the provision of metering services, effectively stranding meter assets.

While tailored meter solutions for customers in a competitive environment may result in some public benefit, NSW submits that the barrier to switching retailers created by increased transaction costs resulting from meter churn would create an overriding public detriment.

Fault Management

NSW contends that where a meter stops functioning, management of the reinstatement of customer supply becomes a problematic issue in the context of a competitive meter provision market. It states that if metering for small customers were competitive, it would be unclear whether the LNSP, who would probably be the party responding to a

distress call from a customer, could immediately install a new meter. This has significant implications for customer service standards.

4.5.4 Need for Unbundled Pricing Methodology

In addition to meter provision, installation and maintenance, the Responsible Person under the Code is also responsible for the provision of metering data services. These services include meter reading, data validation and substitution, estimation, data storage and forwarding. NSW submits that whilst the opening up, over time, of customer choice to most metering data services would not raise significant co-ordination problems for the market, effective competition would require the unbundling of these services from distribution use of system charges (DUoS) and consequently, the resolution of pricing issues.

NSW submits that successful unbundling of meter data services would require considerable work to determine how meter reading should be unbundled from overall DUoS charges.

NSW acknowledges that LNSPs should not be able to charge for meter reading via DUoS charges if this service is performed by another party in a competitive market. It states that under these circumstances, the LNSP's charges should be reduced by an amount representing the cost of meter reading.

NSW submits that the question is whether the reduction should be based on the incremental or average cost savings of the relevant meter read. In a static sense, it would be more efficient for the incremental cost of meter reads to be deducted from DUoS charges. Therefore, rebating only the incremental meter reading costs to retailers who choose to take responsibility for this function may not promote effective competition, nor would the benefits to customers outweigh the costs ultimately imposed upon customers to establish second tier metering competition.

4.6 Submissions from interested parties

4.6.1 Centurion Metering Technologies Pty Ltd

Centurion submits that the derogations are anti-competitive, will stifle innovation, and will ultimately be detrimental to the interests of electricity consumers. Centurion raised the following issues to support this claim:

1. Centurion contends that metering providers would only be able to offer the best technical innovations and prices for asset installation, maintenance and repair where the retailer is given options aside from the distributors' standard offerings.
2. In response to DEUS's claim that metering competition has not been particularly strong in those categories where it is allowed, Centurion argues that this is due to the fact that at present there is little choice in meter service providers beyond those that are subsidiaries of the distributors. Lifting the derogation would promote more effective competition by forcing metering providers to actively market their services across a wider client base.
3. Centurion considers that Load Control is irrelevant to the continuation of the LNSPs' monopoly over metering services. Centurion states that Load Control is solely the domain of, and for the benefit of distributors as an alternative to network augmentation.

Centurion contends that meters and Load Control devices should be totally segregated. Further, Centurion notes that in a competitive market the distributors would have the option of installing separate such devices within their network. Load Control via the meter could be seen by metering service providers as a value-added contestable service and offer such devices on commercial terms.

4. Whilst Centurion agrees that meter churn may occur, it considers that competition will rapidly extinguish inefficient practices and will force distributors and competitive meter providers to make wiser decisions regarding the types of meters installed.

4.6.2 Integral Energy Australia

Integral Energy ("Integral") supports the proposal to extend the period for which LNSPs are responsible for metering services to small customers. Whilst noting that the cost of metering services to small customers is only in the order of 1-2% of customer bills, Integral states that the entire National Electricity Market relies on the integrity of these services.

Integral highlights three main reasons for allowing the derogations to be amended as proposed:

1. Apart from the significant technical difficulties outlined in the applications for the proposed derogations, there would be issues associated with system changes, ongoing additional transaction complexity, failure to identify unrecorded additions and processes for billing for metering services that would only be resolved at significant cost to the industry and ultimately consumers.
2. By accepting responsibility for metering, a FRMP inherently creates a barrier to competition, through both an increase in the complexity of the transfer process and through the additional metering set-up costs that would be faced by a competitor.
3. There could potentially be a conflict of interest created in regions where the FRMP is not the first-tier retailer for a given customer. In these cases, any failure in metering accuracy will negatively impact on the first tier retailer in a given region. The FRMP is only liable for the cost of energy and network charges as recorded by the meter, whereas the first-tier retailer is liable for any difference between the recorded energy and actual usage. The FRMP has little incentive to ensure meter accuracy where any inaccuracy only impacts upon their competitor (i.e. the first-tier retailer).

5. ACCC's considerations

Introduction

The intention of the authorisation provisions in the TPA is to grant authorisation where benefits to the public result from the conduct, and the detriments resulting from the conduct, including the lessening of competition, are outweighed by those benefits.

As noted above, the effect of the NSW derogation is to provide distributors with the exclusive right to provide metering services for small electricity retail customers using meter types 5-7, or in other words, assume the role of the Responsible Person for metering. In the absence of the derogation, the Code allows retailers to elect to be the Responsible Person. This is also referred to as metering competition.

Type 7 installations relate to unmetered supply which essentially involves forms of public lighting. The ACCC considers that the case for distributors to continue in the longer term to be the exclusive providers of unmetered supply is much stronger for this class of installation, particularly as distributors are required to maintain inventory, load and on/off tables that drive the load profiles for each class of type 7 load. Furthermore, innovation is not likely in this particular area of metrology.

The arrangements that provide distributors with exclusivity for metering provision may raise the following trade practices issues:

- the conduct may be taken to be an exclusionary provision, as the arrangements have the effect of restricting the supply of metering services to electricity retailers by providers other than the LNSP; or
- provisions substantially lessening competition, as the derogation effectively disallows competition for the provision of metering services; or
- exclusive dealing, as the derogation requires electricity retailers to procure metering services from a particular LNSP.

By imposing a legal monopoly over service provision, the derogation has the potential to impede the basic economic efficiencies that generally can be achieved in competitive markets, particularly in relation to innovation and lowering costs. In the absence of the derogation, retailers may have the ability to pursue innovative metering, and procure meters and metering data services more cheaply where they are available.

Therefore, under the authorisation test, in order to justify the extension of the derogations, it must be demonstrated that the derogation produces net public benefits that would not occur, or would be lost in the absence of the derogation. The ACCC has considered NSW's applications and the submissions from this premise.

This section considers the arguments advanced by NSW, in submissions, and issues raised by interested parties throughout the ACCC's consultation process.

Meter churn and barriers to switching

NSW submits that where a retailer can elect to be the Responsible Person, it may have an incentive to unnecessarily replace an existing meter with a new meter, and charge the customer for the costs.

This meter churn could also be a barrier to switching as the meter charges, which in the absence of the derogation would be determined by the contract, may deter the customer from switching to another retailer and hence limit the success of FRC. If meters were replaced each time that a customer switched retailer, the result could be inefficient meter churn on an ongoing basis. A related problem is that distributors' metering assets could become stranded where they are replaced by retailers before the asset has been fully depreciated.

NSW submits that allowing retailers to become responsible for meter provision while the market is still in a transitional phase, may promote meter churn and hence become a barrier to the further development of retail competition. A related problem is that distributors' metering assets could become stranded where they are replaced by retailers before the asset has been fully depreciated.

The ACCC considers that this view assumes that retailers will tend to replace meters, irrespective of whether this is a commercially beneficial decision. It is likely that a rational retailer (that does not wish to create barriers to switching) will only choose to replace meters when it is efficient to do so, such as when the meter has reached the end of its useful life or if greater efficiencies can be obtained from obtaining a new meter from the competitive market. The ACCC considers that meter churn can also be a by-product of the adoption of innovative forms of metering.

The ACCC considers that concerns that meters will be removed in circumstances where it is inefficient to do so, may be overstated, and that avoiding meter churn is not of itself sufficient reason to continue the metering derogations. If the retailer did choose to be a meter owner as part of its role as the Responsible Person, it may be uneconomic for it to choose to remove a meter from a customer's site if the meter still has a useful life.

A separate but related issue is that meter churn may create barriers to switching. The discussion in NSW's application on barriers to switching reflects a concern that metering competition provides retailers with incentives to lock customers into retail contracts by way of upfront or exit meter charges.

Barriers to switching can arise from retailer initiated meter churn because the retail contract may provide for meter charges, including exit charges, which deter a customer from switching to another retailer, and hence limit the extent of retail competition. Additionally, discussions with interested parties have highlighted a view that in a competitive metering market, the transaction costs associated with changing meters when a small customer chooses to switch retailer, means that retailers would only compete for customers once, resulting in the market becoming static after initial switching and meter replacement.

The ACCC acknowledges that if retailers did remove meters in circumstances where it was not efficient to do so, the cost of a new meter and its installation is likely to deter some customers from switching retailers. Customers may subsequently be deterred from switching by any exit charges associated with the meter. However, concern that retailers would have an incentive to use the new meter as a means of discouraging the customer from changing retailers again may be addressed through regulatory arrangements. The ACCC notes that, in the United Kingdom, the Office of Gas and Electricity Markets (Ofgem) has endeavoured to address the problem of meter churn and barriers to switching through regulation.

Ofgem recently introduced licence conditions for retailers, whereby meter churn is discouraged if the customer and new retailer do not want it to occur. These regulations ensure that customers only choose to enter into supply contracts with retailers based on the customer's express consent for the replacement of meters. Ofgem's arrangements are also designed to protect the distributor from stranded asset risk. The ACCC notes that these regulations will become of material relevance from 1 April 2005 when Ofgem will formally remove metering charges from the distribution regulated asset base. Therefore the effectiveness of the regulations will only become apparent from that time.

Furthermore, interested parties have argued that regulation might ensure that meter churn is minimised, but that this would merely replicate the outcomes that presently result from the distributor exclusivity. Therefore, the transaction costs associated with introducing regulation in this area would need to be considered and weighed against the potential benefits of metering competition.

The ACCC considers that the cost of regulating meter churn is a legitimate issue that should be considered as part of the response to the recommendations of the Joint Jurisdictional Regulators review of metrology.

Impact on innovation

The ACCC has considered whether the derogation could have a detrimental effect on innovation in meter types and metering services.

The ACCC anticipates that in the absence of the derogation, retailers would be better placed to utilise their knowledge of their customers and the market to achieve efficient metering outcomes for small retail customers. The ACCC is of the general view that, irrespective of future directions in metering, a straightforward approach may be for the market to determine the most efficient means of supplying metering services.

In relation to metering data services, retailers have the potential economies of scope from enabling innovation in metering services, primarily across gas and electricity, but potentially also for water metering. The ability of retailers to source alternative metering data providers could improve the quality of the metering data, and lower costs. Conversely, distributors have incentives under CPI – X regulation to pursue cost efficiencies, but unlike retailers they do not face the same commercial incentives to pursue innovation to provide more innovative price/service offerings.

Furthermore, the ACCC understands that the metering innovations that are emerging internationally, mostly involve meters with remote reading and communications technologies.

While the ACCC recognises that metering innovation is likely to arise through technologies that involve remote meter reading capabilities, NEMMCO's current metering type classifications reflect the specific differences in meter capabilities. For example, type 4 interval meters must be read on a frequency to meet market settlement timeframes (generally, weekly), and these are therefore typically only cost effective for very large customers.

The ACCC understands that some interval meters may have the capability to meet the requirements of a metering installation type 4, even though they may not be read at the frequency required to be classified as a type 4 metering installation. The Joint Jurisdictional Regulators' final report recommends that metering competition be extended to customers who consume more than 'z' MWh per annum and to those who use a meter that meets the requirements of metering installation types 1 to 4, as defined by NEMMCO's definitions of metering types.

The ACCC understands that, under the exclusivity derogations as submitted to the ACCC, NEMMCO's classifications would need to be amended to enable innovations such as remotely read meters that are read less frequently to penetrate the market through retailer innovation. However, the issue of meter classifications is a broader National Electricity Code issue which is more appropriate to be addressed during the response to the Jurisdictional Regulators' report.

It has been suggested, therefore, that some anti-competitive effects of the derogation could be addressed through conditions of authorisation that would ensure that any remotely read interval meters are not captured by the derogation regardless of the frequency with which they are read, and irrespective of whether they meet the existing requirements for type 4 metering installations, thereby enabling innovations to materialise. The ACCC considers that, given that interval meters are being rolled out to certain customers in New South Wales, future innovation is likely to comprise forms of remotely read interval metering. The ACCC considers that a condition to ensure this can occur is necessary. Such a condition will ensure that retailers can pursue innovation in remote (interval) meter reading solutions that are most suitable for their customers.

Type 7 installations relate to unmetered supply which generally involves forms of public lighting. The ACCC considers that the case for distributors to continue in the longer term to be the exclusive providers of metering data services for unmetered supply is much stronger for this class of installation, particularly as distributors are required to maintain inventory, load and on/off tables that drive the load profiles for each class of type 7 load. Furthermore, innovation is not likely in this particular area of metrology.

Load Control Systems

NSW submits that load control at present relies upon the LNSP being able to ensure that the relevant meters conform to specified standards. NSW states that allowing parties other than the LNSP to become the Responsible Person for metering could result in the Load Control system failing due to non-conforming meters being used by those Responsible Persons. The ACCC notes that LNSPs are currently best placed to co-ordinate selection, purchase and installation of such equipment.

However, the ACCC notes that Load Control is, in essence, a separate system to the metering systems themselves. As has been noted by Centurion, in many instances the Load Control device is segregated from the actual meter and has no affect on the meter itself. It has been suggested that if metering services were contestable, the LNSP would still be able to install, activate and maintain Load Control devices separately from the meter. Further, from discussion with market participants, the ACCC understands that once a conforming Load Control device has been installed, minimal further intervention by the LNSP is required to enable the system to function.

The ACCC notes that Load Control devices do play a beneficial role in network operation, by reducing the maximum peak demands through the centralised switching off of appliances, such as hot water systems, on participating sites. This in turn reduces the need for more expensive network augmentation and thus reduces overall costs for end-users. It is possible that if metering services were to be fully contestable those retailers that elected to be Responsible Persons and installed new meters may have an incentive not to install Load Control devices. It is in a retailer's commercial interest to themselves determine disconnection of certain loads, for example air-conditioners at times of price spikes, rather than allow disconnection by the LNSP when efficient for the LNSP. However, the ACCC envisages that this could be addressed through regulatory arrangements, so as to provide certainty to both retailer and LNSP in relation to load disconnection. The ACCC notes that if significant numbers of second-tier retailers elected to be Responsible Persons and did not offer Load Control as part of their metering services, it may result in a need for network augmentation, which would result in higher DUoS charges and thus increased tariffs for end-users.

The ACCC considers that Load Control does provide a public benefit by reducing the need for more expensive network augmentations and that the derogations are likely, in the short term, to ensure the ongoing viability of the Load Control system. In the future, however, it may be possible to develop arrangements under which Load Control can still be offered where the retailer is the Responsible Person.

Accredited Service Provider Scheme

The ACCC notes that the ASP Scheme does allow for increased contestability in relation to certain metering services. Whilst the derogations do not cover first-tier customers the ASP Scheme provides clear benefits by allowing customers to contract with any ASP, it is clear that scope exists for competition and thus price reductions.

The fact that the ASP Scheme covers second tier customers changing their metering arrangements, allows for a measure of competition in relation to one aspect of metering services. The ACCC notes that competition in relation to these services raises fewer logistical and regulatory issues than in relation to other metering services such as meter reading, maintenance and data transfer. Although NSW contends that the ASP Scheme has captured many of the benefits of metering competition, the ACCC notes that further dynamic efficiencies in the areas of meter reading, maintenance and data transfer are possible and that competition could result in further price reductions. These are the issues that are the subject of the derogation.

Conflict of Interest

Integral submits that there could be a conflict of interest created in areas where the FRMP is not the first-tier retailer for a given customer. This would arise from the FRMP only being liable for the energy consumption registered by their metering installation and that the possibility exists for financial impacts on the first-tier retailer, the FRMP's competitor, where inaccuracies exist in the meter.

The ACCC considers that the problem of conflict of interest may be overstated, and that this issue is not material to its deliberations. While metering inaccuracies do exist, trade measurement legislation places accuracy requirements on meters. Meter inaccuracies may work both for and against the FRMP, as inaccurate recording of consumption will affect both the FRMP's wholesale market liability, as well as its retail market takings.

Joint Jurisdictional Regulators' Review of Metrology

As outlined earlier in this document, the Jurisdictional Regulators have conducted a review canvassing a wide range of metering and FRC issues and have identified areas for possible Code changes. The final report proposes a number of Code changes to give effect to its recommendations.

The ACCC accepts that it is necessary to extend the derogations to ensure that there is a comprehensive response to the final recommendations of the Jurisdictional Regulators, and to provide regulatory certainty in the interim. The ACCC also notes that one of the recommendations of the Jurisdictional Regulators' review is that all small customers should be treated equitably in relation to metering services. Currently the Code only regulates metering services provided to second tier customers. The default position for first tier metering is that the distributor is the responsible person.

A Code change will be necessary to bring regulation of first tier customer metering under the Code. Therefore, if the New South Wales derogations were to lapse now, the result would be that second tier retailers retailing to small customers would have the choice to be the Responsible Person but first tier retailers for small customers would not. The ACCC recognises that having different metering arrangements for small first and second tier customers (pending any future Code changes) introduces market complexities.

New South Wales has applied for the derogations to be extended until 31 December 2006. The ACCC considers that it is appropriate to have a balance between allowing sufficient time for implementing the Jurisdictional Regulators' recommendations, whilst minimising the anti-competitive detriment of metering exclusivity.

The ACCC recognises the disruption that may occur as a result of having FRMPs elect to be responsible for metering, given that Code changes may be initiated in the future in response to the recommendations of the Review regarding ongoing distributor metering exclusivity.

In view of the complexity of the issues to be addressed in those Code changes, the ACCC considers that in these circumstances an extension of the derogations until 31 December 2006 is an appropriate timeframe. The ACCC considers that two years is sufficient time in which to implement Code changes to respond to the recommendations of the Joint Jurisdictional Regulators' review.

The ACCC anticipates that the substantive issues concerning metering competition will be revisited in the Code change process that responds to the recommendations of the Joint Jurisdictional Regulators' Final Report on the Review of Metrology Procedures. Nevertheless, the ACCC considers that the process of developing permanent metering arrangements in the Code is an opportunity to promote efficiency and innovation in metering, to enable the full benefits of full retail competition to be realised.

Conclusion

The *Trade Practices Act 1974* requires the ACCC to assess whether the extension of the derogations would produce a net public benefit that would not occur, or would be lost in the absence of the derogation.

From an economic and commercial perspective, it could be expected that, given the choice, a rational retailer would tend to pursue metering solutions that are efficient and beneficial to its business. This may involve two main options. Firstly, retailers might elect to become the Responsible Person and seek innovative or cost-advantageous metering services. Alternatively, retailers may choose to retain LNSPs as the Responsible Persons where this is perceived to be efficient. Furthermore, some of the perceived problems associated with metering competition, as outlined in New South Wales's application, could be addressed through amendment or enhanced enforcement of retail licensing and Code obligations, rather than by maintaining a monopoly on metering services.

The ACCC considers that the key public benefit provided by the derogations is to ensure there is sufficient time to respond to the recommendations of the Jurisdictional Regulators' review. The ACCC therefore accepts that the derogations should be authorised in order to provide interim arrangements that enable the development of a coordinated response to the recommendations of the Joint Jurisdictional Regulators' Review of Metrology Procedures. The ACCC considers that allowing the derogations to be in place until 31 December 2006 will allow sufficient time to implement any Code changes in response to the Jurisdictional Regulators' review.

The ACCC considers that the case for ongoing distributor exclusivity is likely to be stronger in relation to unmetered supply. Due to the LNSP's requirement to keep up to date information on these Type 7 installations they are likely to be best placed to administer these installations. Further, the possibility of innovation in this area is minimal.

The ACCC considers that the key detriment arising from metering exclusivity is that it prevents responsibility for metering residing with the entity most likely to introduce innovative metering arrangements, the retailer.

Taking into account the public benefits and anti-competitive detriments associated with metering exclusivity, the ACCC considers that it is necessary to impose a condition of authorisation to ensure that the derogations meet the authorisation test. The ACCC considers that the derogations should be amended so that remotely read interval metering solutions that are suitable for small retail customers are not subject to distributor metering exclusivity. This would facilitate retailers' pursuit of innovative metering solutions that are most suitable for their customers.

Therefore, this Draft Determination imposes a condition of authorisation to ensure that any meter that incorporates remote reading capabilities, irrespective of how frequently the meter is remotely read, will not be subject to the derogation.

C1 Clause 9.17.A.0(a) must be amended to read:

- a) **For the purposes of clauses 9.17A.1 and 9.17A.2 of this *derogation*, a reference to a “type 5 *metering installation*” is a reference to a type 5 *metering installation* where the electricity flowing through a *connection point* is less than 100MWh per annum and which includes an interval meter that is manually read.**

C2 Clause 9.17A.0 must be amended by the insertion of the following provisions:

- ba) **Despite anything in the preceding paragraph, clauses 9.17A.1 and 9.17A.2 of this *derogation* do not regulate the provision, installation and maintenance of a type 5 *metering installation* that includes an interval meter that is remotely read, regardless of the frequency with which that interval meter is read.**
- bb) **In the preceding paragraph, “an interval meter that is remotely read” means an interval meter that:**
 - i) **is designed to transmit metering data to a remote locality for data collection; and**
 - ii) **does not, at any time, require the presence of a person at, or near, the meter for the purposes of data collection or data verification (whether this occurs manually as a walk by reading or through the use of a vehicle as a close proximity drive-by reading);**

and includes an interval meter that transmits metering data via:

- 1) direct dial-up;**
- 2) satellite;**
- 3) the Internet;**
- 4) GPRS;**
- 5) power line carrier; or**
- 6) Any other equivalent technology.**

6. Draft Determination

On 27 August 2004, the Australian Competition and Consumer Commission (ACCC) received applications for authorisation (Nos A90928, A90929 and A90930) of derogations to the National Electricity Code (Code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf the New South Wales Department of Energy, Utilities and Sustainability.

The applications were made under sub-sections 88 (1) and 88 (8) of the Act 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 Act (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 Act (Form B)
- engage in conduct that constitutes or may constitute the practice of exclusive dealing, within the meaning of section 47 of the Act (Form E).

For the reasons outlined in Chapter 5 of this determination, the ACCC proposes, subject to any pre-determination conference requested pursuant to section 90A of the Act, to grant authorisation to applications A90928 and A90929 pursuant to subsection 88(1) of the Act and to grant authorisation to application A90930 pursuant to subsection 88(8) of the Act.

The ACCC proposes to authorise the derogations until 31 December 2006.

The ACCC proposes to impose a condition that any meter that incorporates remote reading capabilities, irrespective of how frequently the meter is remotely read, will not be subject to the derogation.

Conditions:

C1 Clause 9.17.A.0(a) must be amended to read:

- b) **For the purposes of clauses 9.17A.1 and 9.17A.2 of this *derogation*, a reference to a “type 5 metering installation” is a reference to a type 5 metering installation where the electricity flowing through a connection point is less than 100MWh per annum and which includes an interval meter that is manually read.**

C2 Clause 9.17A.0 must be amended by the insertion of the following provisions:

- ba) **Despite anything in the preceding paragraph, clauses 9.17A.1 and 9.17A.2 of this *derogation* do not regulate the provision, installation and**

maintenance of a type 5 *metering installation* that includes an interval meter that is remotely read, regardless of the frequency with which that interval meter is read.

bb) In the preceding paragraph, “an interval meter that is remotely read” means an interval meter that:

i) is designed to transmit metering data to a remote locality for data collection; and

ii) does not, at any time, require the presence of a person at, or near, the meter for the purposes of data collection or data verification (whether this occurs manually as a walk by reading or through the use of a vehicle as a close proximity drive-by reading);

and includes but is not limited to an interval meter that transmits metering data via:

- 1) direct dial-up;**
- 2) satellite;**
- 3) the Internet;**
- 4) GPRS;**
- 5) power line carrier; or**
- 6) Any other equivalent technology.**

7. Interim Authorisation

Section 91 of the TPA allows the ACCC to grant interim authorisations without it making a decision on the merits of the application. NSW has sought interim authorisation of the derogations.

Simultaneously with the release of this Draft Determination, the ACCC grants interim authorisation of NSW's applications for authorisation, numbers A90928, A90929 and A90930.

The interim authorisation will expire on 31 March 2005.

Under subsection 91(2) of the TPA the ACCC can revoke an interim authorisation at any time.