

Determination

Application for a Minor Variation of Authorisation

Lodged by NECA in respect of the

National Electricity Code

Publication date of the Statement of Opportunities

12 January 2005

Authorisation Nos:

A40074
A40075
A40076

Commissioners:

Samuel
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File no: C2004/1924

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Glossary

ACCC	Australian Competition and Consumer Commission
Act	Trade Practices Act 1974
APR	Annual Planning Review
ANTS	Annual National Transmission Statement
code	National Electricity Code
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
SOO	Statement of Opportunities

1. Introduction

On 17 December 2004, the Australian Competition and Consumer Commission (ACCC) received an application under section 91A of the *Trade Practices Act 1974* (Act) for a minor variation to the existing authorisations (Nos A40074, A40075 and A40076) of the National Electricity Code (code). The application was submitted by the National Electricity Code Administrator (NECA).

The existing authorisations were granted by the ACCC on 10 December 1997, and have been subsequently amended by a number of authorisations of amendments to the code, details of which can be found on the ACCC's website¹. The authorisations granted in respect of the code extend to all current and future participants in the National Electricity Market (NEM).

The minor variation sought is a derogation providing for:

1. A change of the date that the National Electricity Market Management Company (NEMMCO) is required to publish a Statement of Opportunities (SOO) under clause 3.13.3(o) of the code from 31 July to 31 October for 2005
2. A removal of NEMMCO's obligation under clause 3.13.3(o1) of the code to prepare an updated SOO by 31 January for 2005.

NECA proposes that the derogation will apply only until 31 December 2005. It is expected that the new Market Rules under the Australian Energy Market Commission, expected to be released in 2005, will provide for a permanent publication deadline for the SOO of 31 October and will remove the requirement to publish an updated SOO mid year.

The ACCC is satisfied that the proposed derogation is suitable for authorisation using the minor variations provision of the Act.

Authorisation under Part VII of the Act provides immunity from court action for certain types of market arrangements or conduct that would otherwise be in breach of Part IV of the Act.

The ACCC has prepared this determination outlining its analysis and views on the proposed minor variation to the existing authorisations of the code. Chapter 2 of this determination sets out the statutory tests that the ACCC must apply when assessing applications for authorisation and minor variations to authorisations. Chapter 3 contains an outline of the ACCC's public consultation process. The ACCC's analysis of the proposed derogation is set out in chapter 4 and the ACCC's determination is in chapter 5.

¹ www.accc.gov.au

2. Statutory test

The original authorisations were granted 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 effect 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; and
- that benefit to the public 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.

Section 91A of the Act provides that the ACCC may make a determination to vary an existing authorisation, to which sub-section 90(6) applies, if it is satisfied that the variation would not result in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation. Further the ACCC may make a determination to vary an existing authorisation to which sub-section 90(8) applies if it is satisfied that the variation would not result in a reduction to the public benefit arising from the existing authorisation.

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 Act to invite submissions from interested parties before making a determination on an application to vary an existing authorisation.

The ACCC received the application to vary the existing authorisations on 17 December 2004. Notification of the application and a request for submissions was placed on the ACCC's website² on 21 December 2004. 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 amendments to the code. The ACCC did not receive any submissions.

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

² www.accc.gov.au

4. Publication Date of the Statement of Opportunities

4.1 Background

Clause 3.13.3(o) of the code provides that NEMMCO must prepare and publish at a reasonable charge to cover the cost of production, a Statement of Opportunities (SOO) by 31 July each year. The SOO provides information about the adequacy of electricity supplies in the NEM over the next ten years.

Clause 3.13.3 (o1) of the code provides that NEMMCO must prepare and publish at a reasonable charge to cover the cost of production, an update of the SOO by 31 January each year.

In December 2003 the Ministerial Council on Energy extended the transmission planning aspect of the SOO by requiring NEMMCO to publish an Annual National Transmission Statement (ANTS) as part of the SOO. The Annual Planning Reviews (APRs), published on 30 June by the jurisdictional planning bodies, are critical inputs to the ANTS.

4.2 Proposed changes to the code

The minor variation sought is a derogation providing for:

1. A change of the date that NEMMCO is required to publish the SOO under clause 3.13.3(o) of the code from 31 July to 31 October for 2005
2. A removal of NEMMCO's obligation under clause 3.13.3(o1) of the code to prepare an updated SOO by 31 January for 2005.

NECA proposes that the derogation will apply only until 31 December 2005. NECA expects that the new Market Rules expected to be released in 2005, will provide for a permanent publication deadline of 31 October and will remove the requirement to publish an updated SOO mid year.

4.3 Issues for the ACCC

The ACCC believes the proposed changes to the code do not involve a material change to the market rules that have been authorised in respect of the provision of market information.

The ACCC considers that the proposed code changes do not give rise to significant benefits or detriments in terms of the overall authorisation of the code. Hence the ACCC considers the proposed amendments to the code can be dealt with under s91A of the Act as a minor variation to the existing authorisations of the code.

4.4 What the applicant says

NECA states that the first aspect of the derogation, the delay in publication of the SOO, is sought in order to extend the period of time available to NEMMCO to prepare the SOO. Currently the timeframe is tight; the APRs, which assist in the preparation of the ANTS (a component of the SOO), are published on 30 June, and the SOO must be published by 31 July. Due to the tight timeframe, NEMMCO did not consult fully on the content of the contents of the APRs in its preparation of the SOO in 2004.

NECA notes that the SOO provides information relevant to planning for the following ten years; it is a long term planning document and is not considered by NEMMCO to be a critical planning document for the immediate summer. Other NEMMCO publications, including the Medium Term PASA, relate to the immediate summer and thus NECA submits the delay of the SOO is unlikely to affect short term planning.

NECA also submits that given that the SOO is a long term planning document, there is limited benefit in publishing an update of the SOO mid year. On this basis NECA requests that the requirement to publish a mid year update be removed.

4.5 What the interested parties say

The ACCC did not receive any submissions from interested parties.

4.6 ACCC's considerations

The ACCC has considered NECA's application for a minor variation of the authorisations to the code and is satisfied that the variations would not involve a material change in the effect of the existing authorisations.

4.6.1 Change of the date by which NEMMCO must publish the SOO

The ACCC notes that the delay of the publication date of the SOO does not remove any existing obligation on NEMMCO; it merely *modifies* the obligation to publish the SOO by delaying its publication by three months.

Given that the SOO provides information about the ten year period following its publication, the ACCC considers it unlikely that any users of the SOO would be disadvantaged by the delay of its publication by three months. Therefore, the ACCC considers that long term planning will not be adversely affected by the change in publication date of the SOO.

NECA advises that the SOO is essentially a long term planning document, and other reports including the Medium Term PASA are available that relate to short and medium term planning. Therefore, the ACCC considers that planning for the short, medium, or long term will not be adversely affected by the delay in publication of the SOO.

The ACCC does not identify any detriment related to the change of publication date of the SOO. The delay in publication may in fact increase the utility of the SOO, as it will

ensure that NEMMCO can consult fully on the APRs and hence provide a more accurate ANTS as part of the SOO.

4.6.2 Removal of NEMMCO's obligation to publish an updated SOO in January

The ACCC accepts NECA's submission that there is limited benefit in providing a half yearly update to a long term planning document relating to the following ten years. The ACCC assumes that any significant information currently published in the updated SOO will, following these code changes, be published in the SOO relating to the following year. Thus users of the SOO will not lose access to any significant information; they will merely experience a delay in accessing it. Users will now access this information six months later than they would if a mid year updated SOO was published.

A delay of six months is likely to have no effect on users' long term planning, and as noted above, other reports published by NEMMCO address short and medium term planning. Therefore, the ACCC considers that removing NEMMCO's obligation to publish an updated SOO in January will have no identifiable detriment.

NEMMCO advises that the resources consumed (by both market participants and NEMMCO) in the publication of the updated SOO are disproportionate to the benefit of the update. Removing this obligation would eliminate the costs associated with its publication.

The ACCC considers that the net change in public benefits and public detriments arising from relieving NEMMCO of its obligation to publish an updated SOO in January will be minimal, and that any such change will be in favour of public benefits. Any detriment caused by the delay in receiving information will be more than offset by the elimination of the costs of publishing the updated SOO.

5. Determination

The ACCC is satisfied that the variations proposed to the authorisations A40074, A40075, A40076 (as amended) are minor variations, as none of the proposed changes involve a material change in the effect of the existing authorisations.

The ACCC is satisfied that the minor variation proposed to authorisations A40074, A40075, A40076, which are subject to this application, would not result, or would be likely not to result, in a reduction in:

- the extent to which the benefit to the public of the authorisations outweighs any detriment to the public caused by the authorisations; or
- the benefit to the public that arose from the original authorisations.

The ACCC therefore varies authorisations A40074, A40075, A40076 to include authorisation of conduct in relation to the proposed derogation and implemented changes, which are the subject of these applications.

The authorisations of the code shall remain in force until 31 December 2010. However, this derogation will cease to apply on 31 December 2005.