



**NATIONAL ELECTRICITY CODE
ADMINISTRATOR LIMITED**

ACN 073 942 775

Level 5, 41 Currie Street
Adelaide SA 5000
Telephone (08) 8213 6322
Facsimile (08) 8213 6300

26 April 2005

Mr S Roberts
General Manager
Regulatory Affairs – Electricity
Australian Competition & Consumer Commission
360 Elizabeth Street
MELBOURNE VIC 3000

FILE No:
DOC:
MARS/PRISM:

Dear Mr Roberts

NATIONAL ELECTRICITY CODE: CHAPTER 9 DEROGATIONS

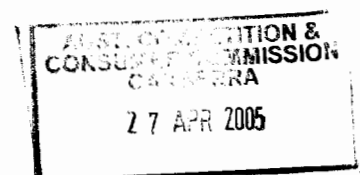
I enclose proposed amendments to Chapter 9, Part B of the National Electricity Code relating to the revenue cap provisions in New South Wales. The facts and details upon which New South Wales relies are set out in the copy of its letter to NECA of 14 April 2005 and the attached application.

The Hon Frank Sartor MP, Minister for Energy and Utilities for New South Wales, has written to other NEM ministers seeking their support for the derogation and has undertaken to forward any responses from other jurisdictional Ministers to the ACCC.

Given that the ACCC is seeking to make its final revenue decision for Transgrid and Energy Australia this month, the Minister has requested that this proposed derogation be forwarded to the ACCC for authorisation and approved as soon as possible.

Yours faithfully

John Eastham
Executive Director





New South Wales

MINISTER FOR ENERGY AND UTILITIES
MINISTER FOR SCIENCE AND MEDICAL RESEARCH
MINISTER ASSISTING THE MINISTER FOR HEALTH (CANCER)
MINISTER ASSISTING THE PREMIER ON THE ARTS

Mr. John Eastham
Executive Director
NECA
PO Box 2575
ADELAIDE SA 5000

14 APR 2005

Dear Mr Eastham

National Electricity Code Transmission Revenue Cap Derogation

I am writing to propose a jurisdictional Code derogation from the National Electricity Code to clarify the basis on which the ACCC plans to determine revenue caps for the transmission businesses in NSW for the period July 2004 to June 2009.

The ACCC's previous decision setting transmission revenue caps for TransGrid and EnergyAustralia expired on 30 June 2004. In April 2004, the ACCC made draft decisions on TransGrid and EnergyAustralia's revenue caps for the five year period commencing 1 July 2004. However, since that time, the ACCC has released its Statement of Regulatory Principles for the regulation of electricity transmission revenues which revised its approach to revenue setting. The ACCC is seeking to make its final revenue decisions for TransGrid and EnergyAustralia in April 2005, based on the Statement of Regulatory Principles.

The ACCC's Statement of Regulatory Principles adopts a new "ex ante" capital expenditure allowance and excludes projects which the ACCC considers uncertain and includes a revised approach to pass through of costs for unforeseen events. The ACCC would vary the relevant revenue determination when a transmission project which it has excluded from its decision is triggered, or when unforeseen events occur. However, the ACCC has legal advice that under the existing National Electricity Code it is not able to implement an excluded project adjustment or to re-open revenue decisions at the request of a transmission business.

A change to the Code is needed to allow the ACCC to fully implement its new approach. The ACCC and transmission companies have been developing a suitable change but this has not yet been agreed. As you are aware, the formal Code change process itself will then take a significant time to implement. This raises significant concerns as to the legal certainty of any determination that the ACCC makes in April, before the Code change is in place.



New South Wales

To remove this uncertainty, I propose a jurisdictional derogation under Chapter 9 of the National Electricity Code. The draft derogation is enclosed for your consideration. The wording of the derogation is adapted from preliminary drafting for the proposed Code change that is currently under discussion.

There is significant public benefit from the derogation by:

- enabling the ACCC to implement its new ex ante approach and make determinations in the form planned without further delay; and
- providing certainty to TransGrid and EnergyAustralia and transmission customers in NSW and ACT as to the validity of the revenue determinations.

I have written to other NEM Ministers seeking their support for the derogation. I undertake to forward the Ministers' responses to NECA and the ACCC.

Please forward the draft derogation to the ACCC for its authorisation. For the reasons explained above, the derogation will need to be approved as soon as possible to address the identified concerns.

If your officers have any queries regarding this matter, they should contact Mr Peter Hoogland, Director Energy Policy and Implementation, NSW Treasury on (02) 9228 4937.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Frank Sartor', with a long horizontal stroke extending to the right.

Frank Sartor

PROPOSED NATIONAL ELECTRICITY CODE DEROGATION FOR NSW

BACKGROUND BRIEFING

Purpose

1. This briefing sets out the background to the proposed jurisdictional derogation to the National Electricity Code (**Code**) for NSW to facilitate the forthcoming ACCC revenue cap decisions for TransGrid and EnergyAustralia.

ACCC change in approach to revenue setting

2. The Code tasks the ACCC with setting revenue caps for Transmission Network Service Providers (TNSPs) such as TransGrid and EnergyAustralia and establishes the framework for these decisions. TransGrid and EnergyAustralia submitted applications to the ACCC in September 2003 regarding revenue requirements for the new five year regulatory period starting 1 July 2004.
3. During subsequent discussions in early 2004, ACCC staff indicated the ACCC's intention to depart from the approach which it had taken in previous revenue decisions. The ACCC then advised TransGrid and EnergyAustralia that they would be given an opportunity to resubmit their formal capital expenditure applications following finalisation of the Commission's new *ex ante* framework (letter to TransGrid dated 30/3/2004). This decision has led to a substantial delay in the ACCC making final revenue decisions for TransGrid and EnergyAustralia.
4. The ACCC issued draft determinations for TransGrid and EnergyAustralia based on the current Code provisions on 28 April 2004. A NSW jurisdictional derogation was then put in place such that TransGrid and EnergyAustralia's prices for 2004-05 would be set using the revenue caps specified in the draft decisions.
5. On 2 March 2005, the ACCC issued supplementary draft revenue decisions for TransGrid and EnergyAustralia based on its new *ex ante* regulatory approach. Final decisions are intended to be released in April 2005.

Without a further derogation there is a risk of further delay or prejudice to TransGrid and EnergyAustralia

6. During its consideration of the TransGrid and EnergyAustralia revenue cap decisions, the ACCC finalised its Statement of Regulatory Principles in December 2004 which maps out, among other matters, the new *ex ante* regulatory structure for setting capital expenditure in an incentive based framework as well as key protection measures for TNSPs for pass-through events, excluded project and material adverse events. However, the ACCC has formed a view that Code changes are required to give full effect to this new regulatory approach (details discussed below).

7. TransGrid and EnergyAustralia have been working with their interstate counterparts in the TNSP Forum to settle with the ACCC the details of the Code change to apply to all TNSPs. However, those Code changes are expected to take between 6 and 12 months to be adopted.
8. Consequently, there is no clear and certain legal basis for the ACCC to issue final decisions for TransGrid and EnergyAustralia based on the approach proposed in the final Statement of Regulatory Principles and the Supplementary Draft Decisions Issued on 2 March 2005. Unless the derogation is put in place for NSW, there is a significant risk of either:
 - (a) further delay in the TransGrid and EnergyAustralia revenue cap decisions; or
 - (b) prejudice to TransGrid and EnergyAustralia compared with those TNSPs whose revenue caps will be set in 2006 and beyond because the ACCC will not be able to provide TransGrid and EnergyAustralia with the above protections.

Details of the new power that the ACCC's Statement of Regulatory Principles says are needed

9. The distinguishing feature of the CPI-X form of regulation that the Code requires the ACCC to apply is that it provides incentives for the regulated business to perform efficiently. It does this by setting a cap for a fixed period (typically 5 years) and permitting the business to keep any efficiency gains (or suffer shortfalls if it is inefficient) during that period compared with its revenue cap.
10. Nevertheless, there are some events which are beyond the control of the TNSP. Such events fall into three overlapping categories:
 - (a) pass-through events (categories of event that can be foreseen and catered for in the revenue cap ranging from tax changes to terrorist events);
 - (b) contingent or excluded projects (a capital project the need or scope of which is uncertain at the beginning of the period); and
 - (c) material adverse events (events of a type that cannot be foreseen) that have the effect of adversely affecting a TNSP's costs.
11. A rigid revenue cap with no provision for adjustment for events beyond the TNSP's control would:
 - (a) impose costly risks on TNSPs; and
 - (b) undermine any efficiencies achieved by the TNSP within the period

because the events are beyond TSNP control.

Public benefit

12. There will be considerable public benefit from the derogation including that the derogation will:
 - (a) enable the *ex ante* regulatory approach to be implemented and the ACCC has stated in its draft decision that the objective of the approach is to “establish certainty and provide incentives for efficient investment”;
 - (b) avoid any uncertainty about the ACCC’s powers to make its intended final revenue cap decisions; and
 - (c) ensure that the decisions are not further delayed awaiting a code change being settled, consulted upon and adopted, thereby avoiding any uncertainty as to the validity of transmission prices charged by TransGrid and EnergyAustralia in the intervening period.

Sun-set for the derogation

13. The derogation would expire on 1 July 2009 from which time the Code change would apply.

DRAFT DEROGATION

Derogation to give effect to the revenue cap reopening provisions of the ACCC's Statement of Regulatory Principles on an interim basis.

Changes to Chapter 9, Part B

After clause 9.16.5(d) insert:

- (e) Notwithstanding clauses 6.2.4(b), 6.2.4(d) and 9.16.5(a), the ACCC must only vary a revenue cap during a regulatory control period where a *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) to which the *revenue cap* applies:
- (i) is, or is reasonably expected to be, *materially adversely affected* as a result of an event beyond the control of the *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) the effects of which were not taken into account when the *revenue cap* was set; and
 - (ii) the *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) has requested in writing that the revenue cap be varied and the request has not been withdrawn in accordance with clause 9.16.5(g).

The ACCC must make a decisions under clause 9.16.5(e) within ten (10) weeks of receipt of a request made under clause 9.16.5(e)(ii).

Whether or not a *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) requests a variation pursuant to this clause does not prevent that *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) seeking, and the ACCC making, allowance or further allowance for the effects of the event in a subsequent *revenue cap* decision for that *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate).

- (f) In varying a revenue cap under clause 9.16.5(e), the ACCC must vary the revenue cap to enable the *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) to recover the additional costs (net of any savings to the *Network Service Provider*) which arise in respect of the regulatory control period from the *material adverse effect* of the event which has triggered the variation but such variation must only extend to that which is necessary to enable such recovery. Such additional costs include, without limitation, additional return on investment, return of investment and operating and maintenance expenses.
- (g) A *Transmission Network Owner* and/or *Transmission Network Service Provider* (as appropriate) may by notice in writing to the ACCC withdraw its request to vary a revenue cap made pursuant to clause 9.16.5(e) at any time prior to the ACCC varying the revenue cap in accordance with clause 9.16.5(f). If the request is withdrawn, the existing revenue cap

continues to apply.

- (h) In setting the revenue cap pursuant to clause 6.2.4(a), 6.2.4(e) or 9.16.5(a), the ACCC may provide for additional amounts to be included in the revenue cap during the regulatory control period to enable the recovery by *Transmission Network Owner* or *Transmission Network Service Provider* of actual or efficient costs (net of any savings to the Network Service Provider) in the event that the following contingencies arise:
- (1) each event (a "pass-through event"):
 - (i) for which full allowance has not been otherwise made in the revenue cap; and
 - (ii) which is of a nature identified in the revenue cap decision as being an event to which this clause applies (including without limitation: tax changes, terrorist events, changes in service standards and a change to the quantity of generator support payments required to be made); or
 - (2) each project (a "contingent project"):
 - (i) for which full allowance has not been otherwise made in the revenue cap; and
 - (ii) the identity or nature of which is identified in the revenue cap as being a project to which this clause applies.
- (i) In respect of revenue caps for which the ACCC has provided pursuant to clause 9.16.5(h) for pass-through events or contingent projects, the ACCC may require the *Transmission Network Owner* or the *Transmission Network Service Provider* (as appropriate) to provide information to enable the ACCC to be satisfied that:
- (1) the pass-through event has occurred;
 - (2) the contingent project has been triggered; or
 - (3) the *Transmission Network Owner* or the *Transmission Network Service Provider* (as appropriate) has correctly quantified the actual or efficient costs of the pass-through event or contingent project (net of any savings to the Network Service Provider).
- Where a Transmission Network Service Provider notifies in writing to the ACCC that a pass-through event has occurred and/or a contingent project has been triggered the ACCC must make a decision as to whether it is satisfied that such an event or trigger has occurred within ten (10) weeks of the notification.
- (j) This clause 9.16.5 expires on 30 June 2009.

Changes to Definitions in clause 9.11.1: New term to be inserted

Column 1: material adverse effect

Column 2: includes, but is not limited to:

- (1) additional major load or generation (which represents more than 10% of the existing capacity of the relevant connection point) which was not taken into account when the *revenue cap* was set; or
- (2) a material change in applicable reliability standards; and
- (3) actual total expenditure arising from the event incurred at any time whether during the year of the event or otherwise; or
- (4) where the actual total expenditure is unavailable, the best available estimates of such expenditure,

which amounts to at least:

- (i) 5% of the total revenue cap in the year of the event; or
- (ii) \$10 million.

Whether or not clauses 9.16.5(e) (i), or 9.16.5(i)(1), (2) and (3) are satisfied is a question of fact. The ACCC will retain the assistance of an independent expert in determining whether the clauses are satisfied. The ACCC and the Transmission Network Service Provider will agree on the independent expert to be retained by the ACCC.

FORM A

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 88(1)

EXCLUSIONARY PROVISIONS:

APPLICATIONS FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that 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 that Act.

-
1. (a) **Name of applicant** (*See Direction 2*) National Electricity Code Administrator Limited (ACN 073 942 775) ("NECA").
- (b) **Short description of business carried on by applicant** Administration of the National Electricity Code ("the Code").
- (c) **Address in Australia for service of documents on the applicant** Mr John Eastham
Director
National Electricity Code Administrator Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8213 6322
Fax: (08) 8213 6300
2. (a) **Description of contract, arrangement or understanding and, where already made, its date** The contract, arrangement or understanding with respect of which this application is made are those entered into by participants in the National Electricity Market, pursuant to the Code as amended in accordance with the letter dated 14 April 2005 on behalf of the

Minister for Energy of the State of New South Wales, the participating jurisdiction, submitted with this Form A (and the accompanying Forms B & E) ("the jurisdictional letter"). These amendments relate to Chapter 9 of the State of New South Wales derogations.

For the avoidance of doubt, this application relates only to the changes to the jurisdictional derogations and not to the Code as a whole.

(b) Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions
(See Direction 4)

See the jurisdictional letter prepared by the jurisdiction in accordance with clause 9.1.1 of the Code submitted with this Form A (and the accompanying Forms B & E).

(c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding

Code Participants, being the National Electricity Market Management Company Limited (ACN 072 010 327) ("NEMMCO") and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form A and any other persons who subsequently register with NEMMCO under the Code as a Code Participant.

3. Names and addresses (where known) of parties and other persons on whose behalf application is made

This application is made on behalf of all Code Participants, being NEMMCO and every person registered with NEMMCO as a Code Participant as of the date of this application and whose names and addresses are listed at Appendix A to this Form A.

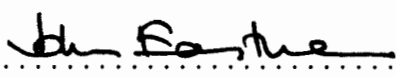
In addition, this authorisation application is made on behalf of and in relation to all persons who become parties to the proposed contract or arrangement after it is made, or become a party to the proposed understanding at a time after it is arrived at, within the meaning of section 88(10) of the Act.

4. (a) **Grounds for grant of authorisation**
- Authorisation is sought on grounds set out in the jurisdictional letter, prepared by the participating jurisdiction in accordance with clause 9.1.1 of the Code, submitted with this Form A.
- (b) **Facts and contentions relied upon in support of those grounds (See Notice 1)**
- These facts and contentions are set out in the jurisdictional letter.
5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understanding, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.**
- (a) **Is this application to be so expressed?**
- Yes, this application is made with respect to each other similar contract, arrangement or understanding or proposed contract arrangement or understanding for the purposes of sections 88(13), (14) and (15) of the Act.
- (b) **If so, the following information is to be furnished:**
- (i) **the names of the parties to each other contract, arrangement or understanding**
- The applicant and all Code Participants (being NEMMCO and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form A within the meaning of section 88(10) of the Act).
- (ii) **the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application (See Direction 5 and Notice**
- The applicant and all Code Participants (being NEMMCO and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form A within the meaning of section 88(10) of the Act) and any other persons who subsequently register with NEMMCO under the Code as a Code Participant. The names of those persons who

- 2) will register with NEMMCO as a Code Participant are not known at this time.
6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)? No
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture? Not applicable
- (c) If so, by whom or on whose behalf are those other applications being made? Not applicable
7. Name and address of person authorised by the applicant to provide additional information in relation to this application. Mr John Eastham
Director
National Electricity Code Administrator Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8213 6322
Fax: (08) 8213 6300

Date: 26 April 2005

Signed on behalf of NECA


.....
(Signature) Mr John Eastham

Director
National Electricity Code Administrator Limited

* **Note:** References in this application to the Act are references to the *Trade Practices Act 1974* and also include the Competition Codes of New South Wales, Victoria and the Australian Capital Territory as defined in the Competition Reform legislation in force in each jurisdiction.

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars or any of them have been reduced to writing - by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not be reduced to writing - by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understanding which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangement or understanding referred to in item 2.

NOTICES

1. In relation to item 4, your attention is drawn to sub-section 90(8) of the *Trade Practices Act 1974* which provides as follows:

“(8) The Commission shall not:

 - (a) made a determination granting:
 - (i) an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding, that is or may be an exclusionary provision; or
 - (ii) an authorisation under subsection 88(7) in respect of proposed conduct; or

- (iii) an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) made a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to."

2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding, the names of the parties to which are not known at the date of application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

FORM B

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 88(1)

AGREEMENTS AFFECTING COMPETITION:

APPLICATIONS FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act; and
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

-
- | | |
|---|---|
| 1. (a) Name of applicant (<i>See Direction 2</i>) | National Electricity Code Administrator Limited (ACN 073 942 775) (NECA) |
| (b) Short description of business carried on by applicant | Administration of the National Electricity Code ("the Code"). |
| (c) Address in Australia for service of documents on the applicant | Mr John Eastham
Director
National Electricity Code Administrator Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8213 6322
Fax: (08) 8213 6300 |
| 2. (a) Description of contract, arrangement or understanding and, where already made, its date | The contract, arrangement or understanding in respect of which the application is made is set out in the letter dated 14 April 2005 on behalf of the Minister for Energy of the State of New South Wales, the participating jurisdiction, |

submitted with this Form B, being amendments to the Code in respect of Chapter 9 of the State of New South Wales derogations ("the jurisdictional letter").

For the avoidance of doubt, this application relates only to the changes to the jurisdictional derogations and not to the Code as a whole.

Code Participants, being the National Electricity Market Management Company Limited (ACN 072 010 327) ("NEMMCO") and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form B and any other persons who subsequently register with NEMMCO under the Code as a Code Participant.

This application is made on behalf of all Code Participants, being NEMMCO and every person registered with NEMMCO as a Code Participant as of the date of this application and whose names and addresses are listed at Appendix A to this Form B.

In addition this authorisation application is made on behalf of and in relation to all persons who become parties to the proposed contract or arrangement after it is made, or become a party to the proposed understanding at a time after it is arrived at, within the meaning of section 88(10) of the Act.

Authorisation is sought on the grounds set out in the jurisdictional letter submitted with this Form B and the accompanying Forms A and E.

The facts and contentions relied upon are set out in the jurisdictional letter.

(b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding

3. Names and addresses (where known) of parties and other persons on whose behalf application is made

4. (a) Grounds for grant of authorisation

(b) Facts and contentions relied upon in support of those grounds (See Notice 1)

5. This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed

contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding.

(a) Is this application to be so expressed?

Yes, this application is made with respect to all similar other contracts, arrangements or understandings, or proposed other contracts arrangements or understandings, for the purposes of sections 88(13), (14) and (15) of the Act. The terms of such other contracts are comprised in the Code as amended by the Code changes.

(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding

The applicant and all Code Participants (being NEMMCO and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form B within the meaning of section 88(10) of the Act).

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application (See *Direction 5 and Notice 2*)

The applicant and all Code Participants (being NEMMCO and every person registered with NEMMCO as a Code Participant as at the date of this application and whose names and addresses are listed in Appendix A to this Form B within the meaning of section 88(10) of the Act) and any other persons who subsequently register with NEMMCO under the Code as a Code Participant. The names of those persons who will register with NEMMCO as a Code Participant are not known at this time.

6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

No.

(b) If so, are any other applications being made simultaneously with this application in relation to

Not applicable.

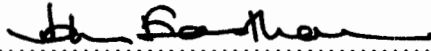
that joint venture?

(c) If so, by whom or on whose behalf are those other application being made? Not applicable.

7. Name and address of person authorised by the applicant to provide additional information in relation to this application. The person nominated in item 1(c) of this form.

Date: 26 April 2005

Signed on behalf of NECA



.....
(Signature) Mr John Eastham

Director
National Electricity Code Administrator Limited

* **Note:** References in this application to the Act are references to the *Trade Practices Act 1974* and also include the Competition Codes of New South Wales, Victoria and the Australian Capital Territory as defined in the Competition Reform legislation in force in each jurisdiction.

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars or any of them have been reduced to writing - by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not be reduced to writing - by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understanding which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangement or understanding referred to in item 2.

NOTICES

1. In relation to item 4, your attention is drawn to sub-sections 90(6) and (7) of the *Trade Practices Act 1974* which provide as follows:

“(6) The Commission shall not make a determination granting an authorisation under sub-section 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or undertaking, in respect of a proposed covenant, or in respect of proposed conduct, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public

constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in,

as the case may be.

- (7) The Commission shall not make a determination granting an authorisation under sub-section 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant."

- 2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding, the names of the parties to which are not known at the date of application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

FORM E

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 88(8)

EXCLUSIVE DEALING:

APPLICATIONS FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

-
1. (a) **Name of applicant (See Direction 2)** National Electricity Code Administrator Limited (ACN 073 942 775) ("NECA").
- (b) **Short description of business carried on by applicant** Administration of the National Electricity Code ("the Code").
- (c) **Address in Australia for service of documents on the applicant** Mr John Eastham
Director
National Electricity Code Administrator Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8213 6322
Fax: (08) 8213 6300
2. (a) **Description of the goods or services in relation to the supply or acquisition of which this application relates** The goods or services in relation to the supply or acquisition of which this application relates is electricity sold into the National Electricity market, as affected by the amendments set out in the letter dated 14 April 2005 on behalf of the Minister for Energy of the State of New South Wales, the participating jurisdiction, submitted with this Form E ("the jurisdictional letter").

For the avoidance of doubt, this application relates only to changes to the jurisdictional derogations and not to the Code as a whole.

(b) Description of the conduct that would or may constitute the practice of exclusive dealing (See *Direction 4*)

The supply of electricity or provision of network services on condition that both the acquisition and resale is in accordance with the Code.

The acquisition of electricity or network services on the condition that the supply is in accordance with the Code.

Refusing to supply or acquire electricity or network services because the supplier/acquirer has failed to comply with the Code.

Aiding, abetting, procuring, counselling or inducing any corporation to engage in any of the above-mentioned conduct.

3. (a) Class or classes or persons to which the conduct relates

The classes of persons are:

- (i) the applicant;
- (ii) Code Participants, being the National Electricity Market Management Company Limited (ACN 072 010 327) ("NEMMCO") and every person registered with NEMMCO as a Code Participant and whose names and addresses are listed in Appendix A to this Form E; and
- (iii) any other subsequent parties to the Code, being all parties who register with NEMMCO under the Code as a Code Participant.

This application is made on behalf of each person identified in Appendix A to this Form E. In addition:

- (a) the authorisation being applied for by this application is, in accordance with section 88(8AA) of the Act, to be expressed so as to apply to the applicant and every person who is registered with NEMMCO as a Code Participant as at the date of this application (being the persons identified in Appendix A to this

Form E), and in relation to each other person who becomes a party to the Code by registering with NEMMCO as a Code Participant; and

- (b) this application is expressed to be made also in relation to other proposed contracts, industry codes of practice, arrangements or understandings that will be in similar terms to the Code within the meaning of sections 88(13), 88(14) and 88(15) of the Act, being each of the proposed contracts, industry codes of practice, arrangements or understandings to be made between a person who registers with NEMMCO under the Code as a Code Participant, the applicant, and each existing participant under the Code at that time.

The names of the parties to each other proposed contract, industry code of practice, arrangement or understanding which are known at the date of this application are the applicant and Code Participants (being NEMMCO and each person who is registered with NEMMCO as a Code Participant as at the date of this application and identified in Appendix A to this Form E). Other than to state that the other parties to each proposed contract, industry code of practice, arrangement or understanding for the purposes of sections 88(13), (14) and (15) of the Act will be persons who register with NEMMCO under the Code as a Code Participant and each existing Participant under the Code at that time, the names of those other parties are not known as at the date of this application.

(b) Number of those persons	(i) At present time	
	NECA and NEMMCO	2
	Generators	57
	Customers	35
	Network Service Providers	27
	Special Participants	19
	Intending Participants	15
	Traders	6
	(ii) Estimated within the next year	
	Unknown	
(c) Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses	Not applicable	
4. (a) Grounds for grant of authorisation	Authorisation is sought on the grounds set out in the jurisdictional letter, a copy of which is submitted with this Form E (and the accompanying Forms A and B).	
(b) Facts and contentions relied upon in support of those grounds (See Notice)	The facts and contentions relied upon in respect of the Code changes are set out in the jurisdictional letter.	
5. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the <i>Trade Practices Act 1974</i>)?	No.	
(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?	Not applicable.	
(c) If so, by whom or on whose behalf are those other applications being made?	Not applicable	

6. **Name and address of person authorised by the applicant to provide additional information in relation to this application.** Mr John Eastham
Director
National Electricity Code Administrator
Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8213 6322
Fax: (08) 8213 6300

Date: 26 April 2005

Signed on behalf of NECA

.....


(Signature) Mr John Eastham

Director
National Electricity Code Administrator Limited

* **Note:** References in this application to the Act are references to the *Trade Practices Act 1974* and also include the Competition Codes of New South Wales, Victoria and the Australian Capital Territory as defined in the Competition Reform legislation in force in each jurisdiction.