

Draft
Determination

Applications for Authorisation

Amendments to the National Electricity Code

Australian Capital Territory Metering Derogations

11 May 2005

Authorisation Nos:

A40100

A40101

A40102

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File no: C2005/487

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Glossary

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ACT Government	Australian Capital Territory Chief Minister's Department
AGL	AGL Retail Energy
code	National Electricity Code
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
ICRC	Independent Competition and Regulatory Commission
JJReview	Joint Jurisdictional Review of Metrology Procedures Final Report (October 2004)
LNSP	Local Network Service Provider (distributor)
MWh	Megawatt Hours
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
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 customer geographical area
the Act	<i>Trade Practices Act 1974</i>
Type 5	Manually read interval meters, capable of storing half hourly electricity consumption data.
Type 5MRIM	For the purposes of this document, a type 5MRIM is a manually read type 5 meter.

Type 5RRIM	For the purposes of this document, a type 5RRIM is a remotely read type 5 meter.
Type 6 meters	Basic or accumulation meters
Type 7 meters	Unmetered supplies (eg streetlights, telephone boxes)

1. Introduction

On 22 March 2005, the Australian Competition and Consumer Commission (ACCC) received applications for authorisation (Nos A40100, A40101, and A40102) of amendments to the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the Australian Capital Territory (ACT) Chief Minister's Department.

The applications for authorisation are in similar terms to previous derogations in relation to the ACT's metering arrangements that were authorised by the ACCC on 5 March 2003.¹ The 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 for small customers by distribution businesses in the ACT. The derogations to the code make the distributor the Responsible Person for second tier customers for types 5, 6 and 7 metering installations. Under the existing jurisdictional instruments, the distributor is the default Responsible Person for small first tier customers.

The derogation in relation to the "Responsible Person" (clause 9.24A.2) will expire on 28 February 2006, while the derogation in relation to "Payment for Metering" (clause 9.24A.3) expired on 30 June 2004. The substance of the current applications is to extend the derogation in relation to clause 9.24A.2 and re-instate the derogation in relation to clause 9.24A.3 until 31 December 2006. The application seeks interim authorisation of the amendments to clause 9.24A.3 of the code.

The applications also include amendments to clause 9.24A.1 of the code which relates to the application of clause 9.24A of the code. The proposed amendments will ensure jurisdictional consistency with the conditions imposed in the ACCC determinations for New South Wales and Victorian metering derogations.² The proposed amendments provide that any interval meter that incorporates remote reading capabilities (type 5RRIM), irrespective of how frequently the meter is remotely read, will not be subject to the derogations in clauses 9.24A.2 and 9.24A.3 of the code.³

The applicant submits that:

- the substantial public benefits provided by the derogations

¹ ACCC, Determination, Applications for Authorisation, Amendments to the National Electricity Code – Australian Capital Territory Full Retail Competition Derogations, 5 March 2003.

² ACCC, Determination, Applications for Authorisation, Amendments to the National Electricity Code - New South Wales Metering Derogations, 2 March 2005; and ACCC, Determination, Applications for Authorisation, Amendments to the National Electricity Code - Victorian Metering Derogations, 2 March 2005.

³ Type 5MRIM and type 5RRIM are terms used in this document for the purpose of distinguishing between the different ways these type 5 meters may be read. This is done notwithstanding that for NEMMCO's classifications and purposes these are the same type 5 meter.

- the jurisdictional consistency provided by proposed amendments to the derogations
- the public detriments that would result from the introduction of metering services competition at a time when Full Retail Competition (FRC) is in its infancy in the ACT

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

Authorisation under Part VII of the *Trade Practices Act 1974* (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 draft determination outlining its analysis and views on the applications for authorisation of the derogations. Chapter 2 of this 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 contains a summary of the application and submissions received in response to the application. The ACCC's analysis of the proposed derogations is set out in chapter 5 and the ACCC's draft determination is in chapter 6. The ACCC proposes to grant interim authorisation for the derogations in clause 9.24A of the code. The ACCC's interim authorisation for the application is in chapter 7.

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 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 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 Act to follow a public process when assessing an application for authorisation.

The ACCC received the applications for authorisation of derogations from the code on 22 March 2005. Notification of the applications and a request for submissions was placed on the ACCC's website⁴ on the same day. Although not required under the Act, 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 received one submission from AGL Retail Energy (AGL).

The ACCC has produced this draft determination on 11 May 2005 outlining its analysis and views of the amendments to the code according to the statutory assessment criteria set out in chapter 2.

The ACCC invites NECA and interested parties to notify it in writing by 26 May 2005 whether they wish the ACCC to hold a conference in relation to this draft determination.⁵ Alternatively, NECA and interested parties may make written submissions to the ACCC. These must be received by 10 June 2005.

If a conference is requested, it will be held in Canberra on 6 June 2005, at a time and place to be notified. NECA and 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.

Following the conference, the ACCC will take into account any relevant issues raised and any related submission, and issue a final determination. If no conference is called or written submissions received, then this draft determination will form the basis for the final determination.

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

⁴ www.accc.gov.au

⁵ 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 application and the ACCC is of the opinion that the interest is real and substantial.

4. Australian Capital Territory Full Retail Competition Derogations

4.1 Background to the existing derogations

The ACCC has previously granted authorisation of code changes that facilitated the introduction of FRC in the electricity market in the States and Territories participating in the National Electricity Market (NEM) (FRC code changes).⁶

The ACCC's authorisation of the FRC code changes imposed conditions requiring the Jurisdictional Regulators to jointly review certain metering issues in the NEM and to assume the role of Metrology Co-ordinator in their respective jurisdictions.⁷ The Metrology Co-ordinator for each jurisdiction is responsible for developing a metrology procedure within that jurisdiction for metering installation types 5, 6 and 7.

Type 5MRIM meters are manually read interval meters capable of reading and storing half-hourly electricity consumption. Type 5RRIMs are remotely read interval meters. Type 6 meters are basic or accumulation meters, which do not provide interval metering data (but may 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 ACT metering regulatory framework

FRC for small customers commenced in the ACT on 1 July 2003. The FRC code changes authorised a set of provisions concerning the metering arrangements in the retail sector. Those NEM jurisdictions which introduced FRC individually pursued derogations from those metering provisions.

The existing ACT derogations were authorised by the ACCC on 5 March 2003. The derogations, set out in clause 9.24A of the code, grant exclusivity for the provision of metering services by distribution businesses in the ACT for small customers. The derogations make the distributor (ActewAGL Distribution), the Responsible Person for second tier customers for types 5, 6 and 7 metering installations. Under the existing jurisdictional instruments, the distributor is the default Responsible Person for small

⁶ ACCC, Final Determination, Full Retail Competition and Registration of Code Participants, 4 August 2001.

⁷ 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).

first tier customers. The derogations also amend the provisions relevant to payments for metering.

The Independent Competition and Regulatory Commission (ICRC) regulates metering services to consumers using less than 160 MWh per annum through its distribution price setting role. The provision of metering and metering data services is classified as an excluded service.

The applicant has applied for authorisation to reinstate clause 9.24A.3 of the code, relating to “Payment for Metering” which expired on 30 June 2004 and extend the derogations set out in clause 9.24A of the code, which includes clauses 9.24A.1, 9.24A.2 and 9.24A.3, until 31 December 2006.

The applicant has also applied for authorisation of proposed amendments to clause 9.24A.1 of the code, relating to the scope of the ACT metering derogations to ensure jurisdictional consistency with the conditions imposed in the ACCC Determinations for New South Wales and Victorian metering derogations.⁸

4.2.1 Joint Jurisdictional 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. The Jurisdictional Regulators were required to review metering installation types 5 and 6, and consider options for developing nationally consistent metrology procedures. Clause 7.13(i) also required the Jurisdictional Regulators to review the effectiveness of the ring fencing 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 Review of the Metrology Procedures⁹ final report (JJReview) relate to the Responsible Person for metering services for small customers.

Specifically, the report recommends that chapter 7 of the code be amended to give Local Network Service Providers (LNSPs) permanent responsibility for metering services for small customers (first and second tier). These are defined as customers who consume less than a certain threshold (‘z’)¹⁰ and have a metering installation that does not meet the requirements of metering installation types 1 – 4. The final report also recommends that metering for all large customers, and/or those with a meter that meets

⁸ *Opcit 2.*

⁹ 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.

¹⁰ The ‘z’ MWh per year consumption threshold is to be set by each jurisdiction.

the requirements of metering installation types 1– 4¹¹, should be contestable (first and second tier). This is depicted in the following table:

Table 1: Recommended 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 LNSPs 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 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 the National Electricity Code Administrator 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 Type 5RRIM meters – ACCC Determinations on derogations from chapter 7 of the code to apply in New South Wales and Victoria

On 2 March 2005, the ACCC made final determinations in relation to the metering derogations sought by Victoria and New South Wales. These determinations imposed a

¹¹ As defined by NEMMCO's definitions of metering types.

condition of authorisation in relation to Type 5 meters. The conditions ensure that remotely read interval meters (Type 5RRIMs), irrespective of how frequently they are read, will not be subject to the derogation.

4.3 Metering provisions and chapter 7 of the code

The role of the Responsible Person is essentially a formal responsibility for managing the commercial aspects of the metering services process.

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

Except where the distributor is the Responsible Person, and is a registered Metering Provider, the Responsible Person must engage a registered Metering Provider to provide, install and maintain metering installations for which they are responsible.

The code enables the Responsible Person to engage different Metering Providers for different aspects of the metering services. For example, the Responsible Person may engage a Metering Provider to install the meter, another to test the meter's technical capabilities, and another Metering Provider to carry out routine maintenance. Although it is between the two parties to establish the commercial arrangements, the Responsible Person cannot transfer its obligations under the code to another party.¹²

4.4 Effect of the proposed ACT derogations

4.4.1 Responsible Person

The effect of the ACT metering derogation in clause 9.24A.2 will be that distributors will continue to be exclusively responsible for providing metering services for customers with types 5MRIM, 6 and 7 metering installations. Therefore, the provision of metering services for customers with type 5RRIM meters will become competitive.

The ACT Government seeks to extend the derogations that are currently in force until 28 February 2006 for a transitional period. The proposed derogation would enshrine the distributor as the exclusive Responsible Person until 31 December 2006.

The derogations would also extend 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 ICRC as the ACT Jurisdictional Regulator.

¹² NEMMCO, *A Guide to the Role of the Responsible Person*, September 2004.

4.4.2 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 all type 5MRIM, type 6 and type 7 metering installations may only be recovered in accordance with the distributor's licence conditions and other applicable regulatory instruments, which includes the distribution price determination set by ICRC for the ACT Distributor (ActewAGL Distribution).

This derogation is to be reinstated until 31 December 2006.

4.5 Issues for the ACCC

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 distributor; or
- the provisions substantially lessen competition, as the derogation effectively prevents competition for the provision of metering services; or
- the conduct may be taken to be 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.

4.6 Submission from the applicant

The ACT Government contends that metering competition is not necessary to enable the substantial benefits of FRC to be realised. The introduction of metering competition for small customers would add an extra layer of complexity that may inhibit the development of core retail competition.

The public benefit arguments put forward by ACT Government in requesting the continuation and reinstatement of the existing derogations relate to a smooth and stable introduction of FRC, the maintenance of cost effective arrangements and concerns about 'barriers to switching' and increased costs. In addition, the applicant submits that it is necessary to allow sufficient time for the development of a coordinated response to the recommendations of the JJReview. The ACT Government 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.

4.6.1 Efficient streamlined arrangements

The ACT Government contends that the current derogations are simple and ensure clear metering arrangements. In the ACT the distributor is responsible for the bulk of tasks in relation to meter provision and metering data services. The ACT Government submits that the current role of the distributor places it in the best position to facilitate the efficient development of the new systems and processes to ensure a smooth and stable introduction of FRC, which would not necessarily result if the existing derogations were removed.

The ACT Government submits that an ineffective transfer process would damage consumer confidence in FRC, deter consumers from choosing to switch retailers and therefore limit the development of FRC.

4.6.2 Cost effectiveness

The ACT Government submits that retaining the distributor as the Responsible Person would reduce the time and work involved in the development of FRC. Maintaining current arrangements would also allow the relevant industry participants to benefit from the experience of identifying the optimal systems and processes required to provide maximum benefits to consumers. In addition, the ACT Government submits that the economies of scale currently enjoyed by the distributor place them in the best position to supply metering services for the initial stages of FRC.

The ACT Government contends that new FRMPs (retailers) can only achieve such economies of scale when a reasonably large customer base is established or through technological innovation, neither of which are likely in the short term.

The ACT Government states that the LNSP already out-sources some of its meter provision and metering data services functions, engaging Metering Providers based on competitive tenders. The LNSP is required to demonstrate to the ICRC that such costs are competitively based when seeking recovery for its costs of providing these services.

The ACT Government contends that current arrangements are cost effective and technically efficient, thus providing maximum benefits to consumers.

4.6.3 Barriers to switching

The ACT Government submits that the key element for the success of FRC in electricity is the ability for customers to switch retailers cheaply and simply. The applicant contends that the extension of the derogations would prevent an ineffective transfer process, which could result in deterring consumers from choosing to switch suppliers and damage consumer confidence in FRC.

The ACT Government considers that the development of competitive metering services would be promoted by the recovery of prudent implementation costs across a broad customer base (through the price control set by the ICRC), rather than those costs being imposed on customers that choose to switch retailers.

Further, the ACT Government contends that a delay in the introduction of competition for metering services would allow more time for the development of an efficient and effective transfer process.

4.6.4 Consistency provided by the derogations

The ACT Government contends that the derogations will also promote consistent regulation of metering services across jurisdictions. The ACT Government notes that its application is consistent with the ACCC's 1 December 2004 draft determinations in respect of New South Wales and Victoria metering derogations whereby they incorporate the condition imposed in the draft determination in respect of Type 5 interval meters which have remote meter reading capabilities. That is, the derogation sought does not apply to such meter installations, which will be competitive. The conditions imposed in the ACCC's New South Wales and Victorian final determinations did not differ substantively to those conditions in the draft determinations.¹³ Further, the ACCC's New South Wales and Victorian determinations also allowed the extension of the derogations to 31 December 2006.¹⁴

4.7 Submissions from interested parties

The ACCC has received one submission on the ACT Government's application to date from AGL Retail Energy (AGL).

AGL notes that it has previously provided comments on the recent New South Wales and Victorian applications for metering FRC derogations.

The AGL submission supports regulatory convergence and aligning the ACT derogations with the recent ACCC final determinations for New South Wales and Victoria. However they are of the view that contestability of metering should ultimately be pursued and that, as with FRC, it will ultimately provide benefits for consumers. AGL note three particular points:

- distributors should be accountable as well as responsible for the metering arrangements
- prepayment meters should be considered a new type of meter – and retailers should be responsible, in order to increase competition
- during the period of the derogations, further amendments may be desirable if current meter trials suggest new benefits.

AGL notes that it is currently undertaking trials and engaging in industry discussions regarding future optimum metering arrangements.

¹³ *Opcit 2.*

¹⁴ *Ibid.*

5. ACCC's considerations

5.1. Introduction

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

The effect of the ACT metering derogations is to provide distributors with the exclusive right to provide metering services for small electricity retail customers using meter types 5MRIM, 6 and 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.

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' ability to pursue innovative metering is enhanced, and they are free to procure meters and metering data services more cost effectively where they are available.

Under the authorisation test, to justify the extension of the derogations, it must be demonstrated that the derogation produces net public benefits. It must be demonstrated that these would not occur, or would be lost, in the absence of the derogations. The ACCC has considered the ACT Government's application and the submission from this premise.

This section considers the question of net public benefit generally with reference to the position advanced by the ACT Government.

5.2 Efficient streamlined arrangements

The ACT Government contends that the current derogations are simple and ensure clear metering arrangements. The ACT Government submits that the current arrangements place the LNSP in the best position to facilitate efficient provision of metering services for types 5MRIM, 6 and 7 metering installations.

Metering data must be collated, processed and delivered to NEMMCO for use in settlement of a retailer's energy purchases in the wholesale market. Metering data is also transferred to participants. LNSPs require metering data for billing network charges, and retailers require metering data both for billing their customers for energy consumption and for reconciling their wholesale settlement obligations.

The ACCC notes that the LNSP does out-source some functions based on competitive tenders for the provision of metering and metering data services. This is also the case in the market for metering types 1 – 4, where the retailers may elect to undertake the role

of the Responsible Person.¹⁵ It could be expected that metering services would also be provided to retailers on a similar basis in a competitive market for metering types 5MRIM, 6 and 7.

The ACCC considers that retailers have a commercial incentive to pursue metering solutions that are efficient and that would be to the benefit of their businesses. In the absence of the derogation, if the most efficient metering solution is for retailers to retain the services provided by distribution businesses, then this is likely to be the case. This view is supported by the conclusions of a consultancy commissioned by the ACCC from Frontier Economics.

The ACCC also notes Frontier's view that, as LNSPs are the default providers of metering services, retailers will only choose to become responsible for metering where the competitive market can provide better services than the LNSPs. The ACCC also notes that the role of the Responsible Person is subject to monitoring and enforcement by NEMMCO, and therefore that retailers would be subject to the same pressure to maintain obligations regarding data integrity as LNSPs would. Further, the ACCC notes that NEMMCO has the ability to monitor Responsible Persons' compliance with their obligations, but that NEMMCO's responsibilities currently do not extend to enforcement of those obligations.¹⁶

5.3 Cost effectiveness

The ACT Government submits that retaining the LNSP as the Responsible Person would reduce the time and work involved in the development of FRC. The ACT Government contends that new FRMPs (retailers) can only achieve such cost efficiencies through economies of scale when a reasonably large customer base is established or through technological innovation, neither of which are likely in the short term.

The relevant question for the ACCC is whether the extension of the derogation will prevent economies of scale from being lost, and not whether or not further efficiencies can be gained under metering competition.

If economies of scale exist, the ACCC would expect that retailers would not opt to become the Responsible Person. Therefore, the ACCC considers that metering competition would not necessarily reduce economies of scale in manual interval meter reading. Moreover, the ACCC considers that the same is true for type 6 metering.

The ACCC expects that a retailer would only elect to undertake this responsibility if it faced efficient price signals. If distributors are the most efficient providers of metering

¹⁵ Types 1– 4 meters are typically used by very large electricity users. Under the Code, retailers have the choice to be the Responsible Person for these metering installations. Hence, the market for metering types 1– 4 is competitive.

¹⁶ National Electricity Market Management Company 2003, *Annual Metering & Retail Development Report 2003*, p34.

services, then it would be in the retailers' commercial interests to continue to procure metering services in this way.

5.4 Barriers to switching

The ACT Government contends that the extension of the derogations would prevent an ineffective transfer process, which could result in deterring consumers from choosing to switch suppliers and damage consumer confidence in FRC.

As noted in the recent New South Wales and Victorian metering determinations¹⁷, 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. If meters were replaced each time that a customer switched retailer, the result could be inefficient meter churn on an ongoing basis.

The ACCC acknowledges that a possible outcome from customers electing to switch retailers could be the inefficient removal of a previous retailer's meter and the installation of a new one. If retailers did elect to remove meters in circumstances where it was not efficient to do so, it may be the case that retailers would charge customers the cost of a new meter and its installation, which may have an effect on customers switching retailers. It is not clear the extent to which retailers would engage in such practices, as it could result in the stranding of newly installed metering assets. It is possible 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 procuring a new meter from the competitive market.

The ACCC considers that the cost of regulating meter churn in the context of a competitive market is a legitimate issue that should be considered as part of the response to the recommendations of the JJReview.

5.5 Unmetered supply

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.

¹⁷ *Opcit 2*

5.6 Impact on innovation

The ACCC has previously considered whether metering derogations could have a detrimental effect on innovation in meter types and metering services. In the absence of the derogation, retailers may be well placed to utilise their knowledge of their customers and the market to pursue efficient metering solutions.

In relation to metering data services, retailers have the potential economies of scope for 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 may not face the same commercial incentives to provide more innovative price/service offerings.

Furthermore, the ACCC understands that the metering innovations that are emerging internationally, mostly involve forms of time of use or interval metering with remote reading and communications technologies. In the Victorian and New South Wales determinations¹⁸, the ACCC imposed a condition of authorisation allowing competition in respect of remotely read interval meters (type 5RRIM) with reference to the expected innovation in these meter types. The ACT is seeking derogations that do not cover type 5RRIMs. That is, the ACT is seeking derogations which ensure that remotely read interval meters, irrespective of how frequently they are read, will not be subject to the derogation. This means that the potential for losses in innovations in metering is a much less significant issue with respect to the present application.

As noted above in paragraph 5.5, the ACCC considers that innovation is unlikely to occur in metering services related to unmetered supply.

5.7 Joint Jurisdictional Review of Metrology

5.7.1 Duration and coverage of derogation

The Jurisdictional Regulators have proposed a number of metering-related code changes. One of the recommendations of the JJReview 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 ACT 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.

¹⁸ *Opcit 2.*

The ACT Government has applied for the derogations in clause 9.24A of the code to be extended until 31 December 2006 to provide sufficient time for a comprehensive response to the recommendations of the JJReview. This response will involve the preparation and consideration of changes to the code to include first tier metering, and more relevantly, the recommendation to make distributors permanently responsible for metering services for small customers. Therefore, the ACCC considers that it is necessary to extend the derogations to ensure that there is a comprehensive response to the final recommendations of the JJReview, and to provide regulatory certainty in the interim.

5.7.2 Consistency prior to response to JJReview

If the derogations were to lapse now, the competitive conditions would differ between the ACT and other jurisdictions. Extending the derogations until 31 December 2006 would ensure both the time for a comprehensive response to the JJReview, and also consistency between NEM jurisdictions in the interim.

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 JJReview. 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 FRC to be realised.

5.8 Distributor accountability

Electricity distributors and retailers have an agreement for the use of the distribution system, and licence conditions which are enforced in the ACT by the ICRC.¹⁹ These provisions govern the service obligations of distributors to their customers. The ACCC recognises that monopoly service provision lessens the incentives for the provider to provide superior service quality. However, the ACCC considers that the ACT regulatory framework provides a mechanism for the resolution of disputes relating to distributors' conduct in providing metering installations following a request by a retailer or customer.

The ACCC notes that the provision and installation of metering installations for second tier customers is also regulated under the ACT regulatory regime²⁰ and that this regime can be used to increase the responsiveness of distributors until a response to the JJReview is completed. The ACCC also considers that the ACT's application, which effectively removes the provision of type 5RRIMs from the derogation, will help to address AGL's concerns about the responsiveness of distributors when providing metering services to retailers' customers, by enabling retailers to assume responsibility for remotely read interval metering. The ACCC also notes that the JJReview recommends that an obligation should be imposed on distributors to not unreasonably withhold consent where a retailer or a customer has requested a meter other than the

¹⁹ These are imposed under the *Utilities Act 2000* (ACT).

²⁰ In particular, the Electricity Network Use of System Code issued by the ICRC.

standard type meter to be installed (recommendation 5.3 (b)). Code changes to implement this recommendation may help to alleviate AGL's concerns.

5.9 Prepayment meters

The ACCC notes AGL's view that prepayment meters should be considered as a new type of meters. The ACCC considers that a recommendation of the JJReview to revisit the existing classifications of meter types 4, 5 and 6 to account for the evolution in metering technology since the categories were first determined, as a more appropriate forum to comprehensively consider the issue of classification of prepayment meters, as raised by AGL.

5.10 Meter trials

The ACCC notes AGL's recommendation that amendments to the derogations may be desirable if the outcomes of metering trials suggest new benefits. However, the ACCC recognises that disruption may occur if the derogations were to expire or change before the resolution of future code changes which are expected to be initiated in response to the recommendations of the JJReview.

5.11 Conclusion

The Act 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 derogations.

The ACCC considers that a key public benefit provided by the derogations is to ensure there is sufficient time to respond to the recommendations of the JJReview. 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 JJReview. 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 JJReview. Pending the response to the JJReview, the derogations will maintain consistency in arrangements for first and second tier metering, and between the NEM jurisdictions.

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.

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.

In previous authorisations of metering derogations, the ACCC considered 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. However, the ACT Government is seeking derogations that do not cover type 5RRIMs. That is, the ACT Government is seeking derogations which ensure that remotely read interval meters, irrespective of how frequently they are read, will not be subject to the derogations. This means that the potential for losses in innovations in metering is a much less significant issue with respect to the present application.

The ACCC believes there is a net public benefit from authorising the derogations until 31 December 2006.

The ACT Government has sought interim authorisation of the amendments to clause 9.24A.3 of the code. The ACCC considers that all the amendments to the code proposed in the application should be granted interim authorisation. The ACCC's interim authorisation for the application is in chapter 7 of this draft determination.

6. Draft Determination

On 22 March 2005, the ACCC received applications for authorisation (Nos A40100, A40101, and A40102) of amendments to the code. The applications were submitted by NECA on behalf of the Australian Capital Territory Chief Minister's Department.

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 small customers with certain metering installation types by distribution businesses in the ACT.

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 this determination, the ACCC proposes, subject to any pre-determination conference requested pursuant to s90A of the Act, to grant authorisation to applications A40100 and A40101 pursuant to subsection 88(1) of the Act and to grant authorisation to application A40102 pursuant to subsection 88(8) of the Act.

The period of authorisation is to 31 December 2006.

7. Interim Authorisation

Section 91 of the Act allows the ACCC to grant interim authorisations without it making a decision on the merits of the application.

Simultaneously with the release of this draft determination, the ACCC grants interim authorisation of the ACT Government's applications for authorisation (Nos A40100, A40101 and A40102).

This interim authorisation comes into force on 12 May 2005 and will lapse when the ACCC's final determination in regard to each application comes into force.

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