

Draft Determination

Applications for Authorisation

Amendments to the National Electricity Code

B2B Governance Code Changes

11 May 2005

Authorisation Nos:

A90958

A90959

A90960

File no: C2005/431

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Glossary

ACCC	Australian Competition and Consumer Commission
Act	Trade Practices Act 1974
B2B	Business to Business
Code	National Electricity Code
Connection point	The agreed point of supply established between Network Service Provider(s) and another market participant.
DNSP	Distribution Network Service Provider
FRC	Full Retail Competition
IEC	Information Exchange Committee
Local retailers	A retailer who is responsible under the laws of the relevant participating jurisdiction for the supply of electricity to franchise and former franchise customers who have not switched retailer in a local area.
Market customers	A retailer who has classified any of its loads as a market load and who is also registered with NEMMCO as a Market Customer under Chapter 2.
Market load	Load at a connection point for which the electricity is purchased from someone other than the Local Retailer and which has been classified by the person connected at that connection point or, with the consent of that person, by some other person, as a market load pursuant to Chapter 2. There can be more than one <i>market load</i> at any one <i>connection point</i> .
MSATS	Market Settlement and Transfer Solution
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company

1. Introduction

On 4 March 2005, the Australian Competition and Consumer Commission (ACCC) received applications for authorisation (Nos A90958, A90959 and A90960) of amendments to the National Electricity Code (the Code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the National Electricity Market Management Company (NEMMCO). On 30 March 2005, NECA requested interim authorisation of the proposed Code changes and on 11 April 2005, NECA submitted an additional Code change dealing with transitional B2B governance arrangements. The ACCC has considered this additional provision as part of its interim authorisation and this Draft Determination.

The ACCC granted interim authorisation of the Code changes on 13 April 2005, pending the ACCC's final determination taking effect.

NECA has submitted to the ACCC an additional Code change dealing with transitional B2B governance arrangements. The ACCC has considered this additional provision as part of its interim authorisation and this Draft Determination.

The Code changes seek to standardise B2B governance arrangements for communications between distribution and retail companies operating in the National Electricity Market (NEM). They are designed to address perceived inefficiencies in the current processes that may act as inhibitors of Full Retail Competition (FRC).

Authorisation under Part VII of the *Trade Practices Act 1974* (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 Code changes. Chapter 2 of this draft determination sets out the statutory test that the ACCC must apply when assessing an application for authorisation. Chapter 3 contains an outline of the ACCC's public consultation process. Chapter 4 deals with the proposed Code changes. The ACCC's analysis of the proposed Code changes is set out in chapter 5 and the ACCC's draft determination is in chapter 6.

2. Statutory test

The applications were made under subs 88(1) and 88(8) of the Act.

Applications made under subs 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 s 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 s 45 of the Act. Further sub s 88(6) provides that an authorisation made under subs 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 subs 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 s 47 of the Act. Further, subs 88(8AA) provides that where authorisation has been granted under subs 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 subs 90(6) and 90(8) of the Act.

Subs 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 understanding would result, or be likely to result, in a benefit to the public
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would, or would be likely to result from the proposed contract, arrangements or understanding.

Subs 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, or understanding 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 (s 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 amendments to the Code on 4 March 2005. Notification of the applications and a request for submissions was placed on the ACCC's website¹ on 10 March 2005. 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 2 submissions - one from AGL's retail business and one joint submission from Powercor and CitiPower (distributors). Both submissions have been placed on the ACCC's public register and are available on the ACCC's web site.

The ACCC has produced this draft determination outlining its analysis and views of the amendments to the Code according to the statutory assessment criteria set out in chapter 2. The ACCC invites 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.² Alternatively, NECA and interested parties may make written submissions to the ACCC. These must be received by 3 June 2005.

If a conference is requested, it will be held in Melbourne on 2 June 2005. NECA, interested parties who receive a copy of the draft determination and any 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 submissions, and issue a final determination. If no conference is called or written submissions received, then the draft determination will form the basis of the final determination.

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

¹ www.accc.gov.au

² For the purposes of the conference, an interested person is a person who has notified the ACCC in writing that the person, or a specified unincorporated association of which the person is a member, claims to have an interest in the applications and the ACCC is of the opinion that the interest is real and substantial.

4. B2B Governance Code changes

4.1 Background

What is B2B?

B2B processes collectively define the communication methodology to be used between distribution, retail and metering service businesses when communicating the large volume of information that underpins FRC activity. B2B potentially affects all energy industry participants as issues such as business processes, technical communication protocols and data delivery mechanisms for B2B are fundamental to how market operators, retailers, distribution businesses and metering service providers conduct their commercial affairs.

Current practice

Currently, B2B communications involve manual processes such as telephone, email, and manual file transfer. Market Customers and Local Retailers (together referred to in this Draft Determination as retailers) and distribution network service providers (DNSPs) in the NEM routinely exchange information in relation to end-use customers. Examples of these information exchanges which are collectively referred to as B2B communications include:

- *service orders* - requests for services by retailers to DNSPs including special meter readings, requests for disconnection, arranging new connection and reconnections and meter maintenance issues;
- *customer and site details* - requests by DNSPs to retailers for customer and site data, including customer details, site address and site access details; and
- *network billing* - billing and remittance of network charges and associated charges for services including issuing an invoice, disputing an invoice and resolution of disputes and payment advice.

As they have developed separately across the jurisdictions, B2B Communications and attendant protocols between DNSPs and retailers currently occur on a State and bilateral basis. For example, in Victoria, DNSPs and retailers exchange information with each other under B2B information exchange schemes that were approved by the Essential Services Commission (ESC) in early 2003. These schemes came into existence pursuant to clause 14A of the distribution licences which required Victorian DNSPs to submit them to the ESC for approval. To ensure that these schemes operate effectively, retailers in Victoria are required by a condition of their retail licences to participate in the approved schemes. A similar scheme is proposed for New South Wales.

Deficiencies in current practice

The following concerns exist in relation to the B2B governance model as it exists today:

- *Inefficiency and inconsistencies* – Different specifications and information exchange protocols exist between jurisdictions for the same or similar B2B communications. The differing arrangements are proving less efficient than is considered optimal with the required level of manual intervention and related disputes in relation to B2B communications. Differences have added cost and complexity to the operation of DNSPs and retailers operating in more than one jurisdiction and present a cost barrier to businesses expanding into additional jurisdictions. This may be inhibiting the development and success of FRC. The ESC has stated that

“problems with B2B information systems appear to be impeding the timely transfer of customers between retailers, and generating billing problems for a significant number of customers. This has the effect of reducing the efficiency and raising the cost of the competitive retail market, and may undermine the willingness of customers to participate in the market”.
- *Limited enforceability* – Other than in Victoria, compliance with B2B arrangements is voluntary. Despite agreements in forums such as the NSW B2B Steering Committee and the National B2B Working Group (B2BWG), each business can decide whether, when and how to implement any B2B arrangements.
- *Inadequate management and direction* – The current model involves the National B2BWG developing national B2B specifications and jurisdictional B2B specifications that are considered by state-based committees. The National B2BWG has over 200 interested people on its mailing list – however it does not have a clearly defined membership, a formal head of power in the Code or any other jurisdictional instrument, nor does it report to a peak body on national matters. Industry has identified the clear need for the development and implementation of national B2B Procedures under the control of a properly constituted, representative body that considers and balances the benefits and detriments of B2B investments to the industry as a whole.

4.2 Issues for the ACCC

In assessing these applications for authorisation, the ACCC must apply the statutory test and consider whether the public benefits of the proposed B2B governance arrangements outweigh any potential public detriments that may arise from the proposed conduct. This includes any potential for the Code changes to substantially lessen competition or lead to exclusionary arrangements.

4.3 What the applicant says

NECA states that the objective of the proposed Code changes is for B2B communications to be conducted uniformly across the NEM to the specifications prescribed by B2B procedures and address perceived deficiencies. Features of the proposed arrangements include:

- the provision of a *central B2B eHub* to address inefficiencies and create a national system of information sharing. This will be operated by NEMMCO;
- the creation of an *Information Exchange Committee (IEC)* to act as a governing body and provide clearer management and direction. The committee will be composed of 3 members from distributors, 3 members from retailers and 2 independent members who will be elected according to the committee's Election Procedures. An independent member may not be an employee or director of a distribution business or retailer. The proposed arrangements also provide for a review process;
- the *automation and standardisation of current B2B activity* to address jurisdictional inconsistencies including protocols and mechanisms intended to support the information requirements and transactions of retail competition in partnership with the existing Market Settlement and Transfer Solution; and
- the *enforcement of participation through the creation of obligations*. The proposed B2B arrangements will replace current state-based jurisdictional arrangements, and will apply to both first and second tier connection points. Distributors, retailers, metering providers and NEMMCO will all be subject to the obligations. Distribution businesses and retailers will be permitted to enter into bilateral agreements to undertake B2B Communications on a basis other than that set out in the B2B arrangements.

NEMMCO Consultation Process

A representative industry group comprising distribution businesses, retailers, dual-fuel companies, companies operating in one or more jurisdictions and NEMMCO developed the proposed Code changes. The NECA Code Change Panel received eight submissions on the proposal and noted the broad industry support for the Code changes.

4.4 What the interested parties say

The ACCC has received two submissions from its public consultation process and both provide support for the Code changes.

AGL's retail business believes that adopting uniform national procedures will benefit all retailers (and therefore customers) by reducing the cost of maintaining current manual and varied B2B methods.

In a joint submission, CitiPower and Powercor (Victorian distribution businesses) assert that the current processes are inefficient and carry the risk that B2B standards may diverge and adversely affect retail competition.

Both submissions have expressed the view that the Code changes will increase efficiency and accuracy of information exchanges.

5. ACCC's considerations

The authorisation provisions in the Act allow the ACCC to grant authorisation where public benefits from the conduct outweigh any potential anti-competitive detriments.

The ACCC considers that the proposed B2B governance arrangements are likely to provide the following public benefits:

- *facilitation of full retail competition* - This B2B proposal is expected by its supporters to have a positive effect on FRC in the electricity retail market. Effective centralised arrangements will allow retailers to enter other jurisdictions using the same B2B systems and procedures, thereby incurring only incremental costs. New entrants will be able to enter the NEM in the segment of their choice using common B2B procedures and readily available systems;
- *efficiency gains* - The automation and standardisation of current B2B activity is expected to increase efficiency in the NEM. It is expected by industry that the Code changes will provide economies of scale and increased efficiencies in communications procedures because businesses will have the opportunity to implement and maintain only one version of B2B Procedures (subject to any bilateral arrangements); and
- *better management and direction* – The IEC is expected to provide clear management and direction of B2B governance. The proposed composition and structure of the IEC is intended to ensure that the committee is representative of distributors and retailers (as a whole). The committee will be subject to checks and balances on its decision making powers but it is anticipated that it would still be capable of decision making in an effective and efficient manner.

In the context of B2B schemes and information hubs generally, the ACCC recognises that they may lessen competition by raising barriers to entry where arrangements will require businesses to adhere to uniform standards and protocols. They may also lead to exclusive dealing where requirements for a centralised information hub can limit the ability of businesses to access critical information.

However, the ACCC has not received any submissions raising anti-competitive detriments associated with the NEM B2B proposal. Any concerns regarding barriers to entry are mitigated by the fact that the proposal provides some protection for small retailers through the inclusion of opt-out provisions where these can be arranged with relevant distributors. While the arrangements involve a centralised eHub and may require businesses to procure critical information from this hub, it is noted that attempts at industry-based solutions have failed to deliver an acceptable NEM-wide solution to date, and that there is wide support within industry to establish an eHub.

The ACCC notes that there are a number of minor drafting errors in the proposed Code changes which NECA may wish to consider prior to gazettal.

Conclusion

The ACCC considers that the case for granting authorisation has been made. The ACCC considers that net public benefits are likely to flow from the implementation of the proposed B2B governance arrangements.

6. Draft Determination

On 4 March 2005, the ACCC received applications for authorisation (Nos A90958, A90959 and A90960) of amendments to the Code. The applications were submitted by the NECA on behalf of NEMMCO. On 11 April 2005, NECA submitted an additional Code change dealing with transitional B2B governance arrangements. The ACCC has considered this additional provision as part of this Draft Determination.

The main objective of the proposed Code changes is for B2B communication to be conducted uniformly across the NEM to address perceived deficiencies. The proposed arrangements include:

- the provision of a *central B2B eHub* to address inefficiencies and create a national system of information sharing to be operated by NEMMCO;
- the creation of an *Information Exchange Committee (IEC)* to act as a governing body and provide clearer management and direction;
- the *automation and standardisation of current B2B activity* to address jurisdictional inconsistencies; and
- the *enforcement of participation through the creation of obligations*.

The applications were made under subs 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 s 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 s 45 of the Act (Form B)
- engage in conduct that constitutes or may constitute the practice of exclusive dealing, within the meaning of s 47 of the Act (Form E).

For the reasons outlined in section 5 of this determination, the ACCC proposes, subject to any pre-determination conference requested pursuant to s 90A of the Act, to grant authorisation to applications A90958 and A90959 pursuant to subs 88(1) of the Act and to grant authorisation to application A90960 pursuant to subs 88(8) of the Act.

The period of authorisation is to 31 December 2010.