

Determination

Applications for a Minor Variation of Authorisation

Lodged by NECA in respect of the

National Electricity Code

Tasmanian technical derogations

2 February 2005

Authorisation Nos:

A90759

A90760

A90761

Commissioners:

Samuel

Sylvan

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Smith

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File no: C2005/054

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Glossary

ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974</i>
code	National Electricity Code
ESI Act	The Electricity Supply Industry Act 1995 (Tasmania)
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
TNSP	Transmission Network Service Provider

1. Introduction

On 4 January 2005, the Australian Competition and Consumer Commission (ACCC) received an application under section 91A of the *Trade Practices Act 1974* for minor variations to the existing authorisation (Nos A90759, A90760 and A90761) of amendments to the National Electricity Code (code). The applications were submitted by the National Electricity Code Administrator (NECA) on behalf of the Tasmanian government.

Tasmania is preparing for entry into the National Electricity Market (NEM) in May 2005. It previously sought approval of a number of transitional derogations considered essential to facilitate the smooth entry of Tasmania into the NEM. The ACCC authorised those derogations on 14 November 2001.

Since that date a number of changes to the code have occurred, particularly with the introduction of the technical standards code changes, which have made some of the previously approved derogations unnecessary. Other changes relate to:

- amendments to definitions
- adjustments to the terminology referencing operational frequency standards in Tasmania and
- aligning the definition of transmission to the definition used in the Tasmanian Electricity Supply Industry Act.

The ACCC is satisfied that the proposed code changes are suitable for authorisation using the minor variations provision of the Trade Practices Act.

Authorisation under Part VII of the Trade Practices 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 Trade Practices Act.

The ACCC has prepared this 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 and minor variation to an existing authorisation. Chapter 3 contains an outline of the ACCC's public consultation process. The ACCC's analysis of the proposed derogations is set out in chapter 4 and the ACCC's determination is in chapter 5.

2. Statutory test

The original authorisations were granted under sub-sections 88(1) and 88(8) of the Trade Practices Act.

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

Sub-section 90(6) provides that the ACCC shall grant authorisation to arrangements with the purpose or affect of substantially lessening competition or exclusive dealing arrangements (other than third line forcing) only if it is satisfied in all the circumstances that:

- the provisions of the proposed contract, arrangement or conduct would result, or be likely to result, in a benefit to the public; 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.

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

The value of authorisation for the applicant is that it provides protection from action by the ACCC or any other party for potential breaches of certain restrictive trade provisions of the Trade Practices 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 Trade Practices 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 Trade Practices Act to follow a public process when assessing an application for authorisation.

The ACCC received the application to vary the existing authorisations on 4 January 2005. Notification of the application and a request for submissions was placed on the ACCC's website¹ on 8 January 2005. 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 derogations. The ACCC received no submissions.

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

¹ www.accc.gov.au

4. Tasmanian technical derogations

4.1 Background

Tasmania is preparing for entry into the NEM in May 2005. It previously sought approval of a number of transitional derogations considered essential to facilitating the smooth entry of Tasmania into the NEM framework. The ACCC authorised those derogations on 14 November 2001.

Since that date a number of changes to the code have occurred, particularly with the introduction of the technical standards code changes, which have made some of the previously approved derogations unnecessary. Other changes relate to:

- amendments to definitions
- adjustments to the terminology referencing operational frequency standards in Tasmania and
- aligning the definition of transmission to the definition used in the Tasmanian Electricity Supply Industry Act.

4.2 Issues for the ACCC

At the time the original authorisation to Tasmania's derogations was granted a number of significant concerns arose regarding the frequency operating standards and the technical standards to apply in Tasmania. A number of conditions were imposed to minimize the impacts arising as a consequence of these differences. The ACCC still believes that the transitional arrangements for Tasmania should involve the least possible departure for the shortest period practicable from the framework that applies elsewhere in the NEM.

4.3 What the applicant says

NECA states that the Tasmanian government has made provision for modified derogations to be incorporated in the NEM rules which, under the reforms being pursued by the Ministerial Council on Energy, are to replace the code later this year. In seeking authorisation of these variations, the Tasmanian government is trying to cover the situation that might arise if the Ministerial Council reforms are delayed.

The applicant itemises the changes from the original Tasmanian derogations, as amended to incorporate the conditions of authorisation stipulated in the 14 November 2001 determination.

The applicant states that:

- clause 9.42.1 (definitions) is amended to reflect updated instruments and company details

- clauses 9.46.1, 9.46.2, 9.46.3, 9.47.3 and 9.49.1 (concerning frequency operating standards) are amended to update the terminology to the current NEM standards
- clause 9.46.5, schedule 9.H.1 is deleted removing a requirement for region specific operating procedures
- clause 9.47.4 (fault clearance times) is amended to reflect the technical standards review and to fully apply the transition provisions of the review to Tasmania
- clauses 9.47.5 (reactive power) and 9.47.6 (governor response) have been deleted as a consequence the implementation of the technical standards review
- clause 9.48.2 is amended to carry forward an existing determination of sunk assets rather than require a new determination be made
- clause 9.48.5 is amended to align the definition of transmission assets to the definition under existing Tasmanian legislation by which the “pre-NEM” revenue cap determination has been made.

4.4 ACCC’s considerations

The ACCC agrees that the amendments to company details and instruments are minor in nature and will have no impact on the existing authorisation.

The amendments to the frequency standards and operating procedures do not change the effect of the existing authorisation, and hence can be considered minor variations. Whereas the ACCC was concerned that Tasmania’s frequency standards and operating procedures were markedly different from the rest of the NEM, the changes now proposed to the derogations greatly reduce or eliminate a number of those differences. The ACCC considers this to be a positive move that will increase the public benefit by further harmonising Tasmanian market arrangements with the rest of the NEM.

As a consequence of the technical standards code changes a number of further derogations must be amended or are no longer required under the grandfathering provisions embodied in those code changes. The ACCC considers that these amendments do not materially impact on the existing authorisation, which clearly provides for technical standards to apply in some form. Hence the ACCC believes the changes to the derogations on fault clearance times, reactive power and governor response can be considered to be minor variations. Further, the ACCC considers deletion of provisions that otherwise entail a departure from the NEM framework will enhance public benefit.

The ACCC agrees that the grandfathering provisions of the technical standards code changes as they relate to Tasmania upon its entry into the NEM were intended to also include those aspects of network facilities which deal with protection systems and fault clearance times. The addition of clause 9.47.4(d) as proposed will eliminate the possibility that different arrangements might result in Tasmania from the situation that

has applied elsewhere. The ACCC considers that the administrative burden on Tasmanian network service providers resulting from this addition is unlikely to be significant and therefore, no material detriment arises from the addition.

The applicant proposes to amend the date upon which a Ministerial valuation of sunk assets is made from the “Transition Date” to 30 June 2001 on the basis that the Ministerial valuation has been made. The ACCC considers that the proposed change is a minor variation in that it does not materially effect the existing authorisation. The ACCC does not see an urgent requirement to replace the 2001 valuation with a later valuation and notes doing so would require significant effort both by the Tasmanian government and TransEnd, the Tasmanian transmission network service provider. The ACCC notes the derogation otherwise grants the ACCC the power to reopen a pre-NEM determination should it later emerge there are material grounds for doing so. Accordingly, the ACCC is satisfied that no material detriment arises from this amendment.

The change in the definition of transmission assets in Tasmania away from the 88kV criteria previously approved does not have significant impact on transmission regulation under chapter 6 of the Code. Its purpose is to align the definition with the definition used in the *Electricity Supply Industry Act* (Tasmania). This change results in the definition capturing the same assets that are the subject of the ACCC’s revenue cap determination. It would be wrong for the definition to do otherwise. Therefore, the amendment results in a public benefit of ensuring consistency between the revenue determination and the underlying asset base.

Overall, the ACCC considers that the nature of these amendments do not involve a material change to the existing authorisations, and specifically would not give rise to any identifiable benefit or detriment that is particularly important in terms of the authorisation of the Tasmanian derogations as a whole.

5. Determination

The ACCC is satisfied that the variations proposed to the authorisations A90759, A90760, A90761 (as amended) are minor variations as none of the proposed changes involve a material change in the effect of the existing authorisations.

The ACCC is satisfied that the minor variations proposed to authorisations A90759, A90760, A90761 which are subject to this application, would not result, or would be likely not to result, in a reduction in:

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

The ACCC therefore varies authorisations A90759, A90760, A90761 to include authorisation of conduct in relation to the proposed code changes and implemented changes, which are the subject of these applications.

The authorisations shall remain in force until 31 December 2010.