



28 June, 2002

Mr Michael Rawstron
General Manager
Regulatory Affairs - Electricity
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602



Dear Mr Rawstron

NEM ACCESS CODE

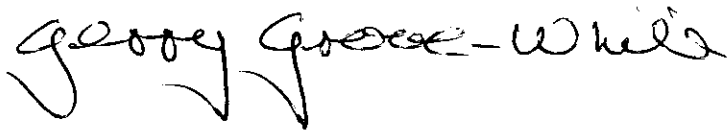
The National Generator Forum (NGF) is pleased to make this submission to the Commission in respect of the NECA Application for variation of the NEM Access Code. The NGF recognises the sometimes complex interplay between the National Electricity Code as authorised by the Commission under Part VII of the Trade Practices Act (TPA) and the NEM Access Code accepted by the Commission under Part IIIA of the TPA. The attached submission examines these complexities and concludes that the Commission should not accept the NECA application at this time for several reasons.

1. NECA has provided no justification or explanation for its application, except to characterise it as a "housekeeping" matter. The information in the NECA application is inadequate and insufficient to enable the ACCC to assess the application in accordance with the accepted administrative law principles it has adopted for consideration of applications to vary an access code. In particular, the NECA application does not provide any material to support the proposition that the market rules in chapter 3 of the Code can or should be included as part of an access code.
2. The market rules do not set out the rules for access to the national electricity transmission network, nor are they incidental to those rules. They are therefore irrelevant to the access code and should not form a part of it.
3. The "generalist" approach taken by NECA means that the ACCC is being asked to consent to variations to the NEM Access Code which would include provisions that fall outside the scope of Part IIIA of the TPA.

4. It is inappropriate for the market rules to be included in the access code because the market rules define and regulate the operation of a competitive market. In contrast the access code governs access to infrastructure which cannot practicably be duplicated and must therefore be regulated because of its inherently monopolistic nature.

If you require any further information in relation to this submission please contact the nominated NGF contact officer.

Yours faithfully

A handwritten signature in black ink that reads "Gerry Grove-White". The signature is written in a cursive style with a large, sweeping initial 'G'.

Gerry Grove-White
CHAIRMAN

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Submission by National Generators' Forum

ACCC consent to changes to the NEM Access Code

1 Glossary

For the purposes of this submission:

ACCC is the Australian Competition and Consumer Commission.

Act is the *Trade Practices Act 1974*.

NEC is the National Electricity Code (as amended).

NECA is National Electricity Code Administrator Limited.

NECA Application is the application made by NECA to the ACCC for variation of the NEM Access Code under s44ZZAA(6) of the Act, particulars of which are set out in NECA letter to the ACCC dated 10 May 2002.

NEM is the National Electricity Market.

NEM Access Code is the National Electricity Market Access Code as accepted by the ACCC on 16 September 1998 and 20 January 1999.

NGF is the National Generators' Forum.

2 Introduction

2.1 The NECA Application seeks the consent of the ACCC to vary the NEM Access Code in accordance with s44ZZAA(6) of the Act. The NECA Application states:

“The variations sought to be included in the approved NEM Access Code are:

- all other provisions of the Code not subject to the Commission's approval of the NEM Access Code granted on 20 January 1999 (including chapter 3 for the first time); and
- those changes to the Code identified in Schedule A.

The granting of such an approval would mean that the Code *in its entirety* would form the approved NEM Access Code for the purposes of s44ZZAA of the *Trade Practices Act 1974*, except for those Code changes which only have interim authorisation. This is considered both sensible from the viewpoint of completeness and necessary to the extent that chapter 3 contributes part of the access regime for market network service providers and is effectively a condition of that access for many connection applicants.” (Emphasis added).

3 Summary

Principal submissions

3.1 The principal submissions of the NGF are as follows:

- (a) **(NECA assumptions are flawed)** The NECA Application is based on two flawed assumptions; namely:
 - (i) that the whole of Chapter 3 is capable of being accepted by the ACCC as part of the NEM Access Code; and
 - (ii) that any provisions of Chapter 3 that do, or are likely to, represent rules for access to a service are not already included within the NEM Access Code as accepted by the ACCC following its decisions on 16 September 1998 and 20 January 1999.
- (b) **(NEM Access Code already deals with NECA's concerns)** The NEM Access Code as accepted by the ACCC by its decisions of 16 September 1998 and 20 January 1999, incorporates those provisions of Chapter 3 of the NEC that are rules for access to a service.
- (c) **(No change necessary)** As a result, the NECA Application, to the extent that it seeks to include the whole of Chapter 3 in the NEM Access Code, is unnecessary and should be withdrawn.
- (d) **(Only part of chapter 3 is relevant)** In any event, it is only those provisions of Chapter 3 that are rules for access to a service, or are necessarily incidental to those rules, that are capable of being accepted by the ACCC under section 44ZZAA of the Act. The NECA Application, to the extent that it incorporates the whole of Chapter 3 of the NEC, is not an application to vary an access code under section 44ZZAA(6) for the reason that the whole of Chapter 3 does not comprise a set of rules for access to a service.

No justification provided

3.2 The NECA Application is deficient in that it fails to provide sufficient information (and quantitative support for that information) to enable the ACCC to:

- (a) determine whether the variations sought in the NECA Application fall within the scope of Division 6 of Part IIIA of the Act;
- (b) determine whether the contentions made by NECA are valid or accurate; or
- (c) assess the variations sought by NECA in accordance with the processes and procedures that are adopted by the ACCC in relation to applications for variations under s44ZZAA(6).

- 3.3 It is submitted that the “generalist” approach taken by NECA means that the ACCC is being asked to consent to variations to the NEM Access Code which would include provisions that fall outside the scope of Division 6 of Part IIIA of the Act.
- 3.4 NECA has provided no justification or explanation for the NECA Application, except to characterise it as a "housekeeping" matter. The information in the NECA Application is inadequate and insufficient to enable the ACCC to assess it in accordance with the administrative law principles it applies in relation to applications to vary an access code. In particular, the NECA Application does not provide any material to support the proposition that the market rules in chapter 3 of the NEC can or should be included as part of an access code.

NEM Access Code and market rules need not be identical

- 3.5 The NEC performs two relevant functions, and the ACCC has a separate and distinct role in relation to each. Its first function is as an access code providing the rules for access to the south-eastern Australian electricity transmission network, being a facility that would be uneconomic to duplicate and is of national significance. The ACCC has accepted it as an access code in exercise of its powers under Division 6 of Part IIIA of the Act. Its second function has been the authorisation of the rules of the wholesale electricity market under Division 1 of Part VII of the Act. The ACCC determined that these rules have a net public benefit and authorised them, together with the balance of the NEC, accordingly.
- 3.6 There is no reason, whether for completeness or convenience, or otherwise, why the NEM Access Code and the market rules should be identical. The two are separate and distinct, although some provisions of the NEC are common to both.
- 3.7 The market rules do not set out the rules for access to the national electricity transmission network, nor are they incidental to those rules. They are therefore irrelevant to the NEM Access Code and should not form a part of it.

ACCC has already dealt with these issues

- 3.8 These distinctions were recognised by the ACCC in its original consideration of the application for authorisation of the NEC and there is no reason to change from that position.
- 3.9 It is submitted that the NEM Access Code as accepted by the ACCC incorporates, and would by reason of necessary implication be taken to incorporate, any provisions of Chapter 3 of the NEC, *to the extent that* (but not otherwise) those provisions fall within the scope of Division 6 of Part IIIA of the Act.
- 3.10 It is inappropriate for the market rules to be included in the NEM Access Code because the market rules define and regulate the operation of a competitive market, while the NEM Access Code sets out rules for access to services provided by means of the relevant facilities.

Possible unintended consequences

- 3.11 Leaving to one side the technical legislative threshold issues, the incorporation of the whole of Chapter 3 of the NEC into the NEM Access Code would give rise to unintended results and consequences, including the potential for the ACCC to impose a regulatory regime over free market activity which is undertaken in an environment of workable competition.

4 Introductory comments on the NEC under the Act

- 4.1 The NEC, which is given effect under the National Electricity Law, has been dealt with formally under the Act in two distinct and separate ways. They are:
- (a) the authorisation process under Part VII of the Act, which deals with the fact that certain elements of the NEC contravene or could contravene Part IV of the Act (particularly the provisions of Chapter 3 of the NEC which could be seen to amount to price fixing); and
 - (b) review under Part IIIA of the Act in relation to access matters (ie the acceptance by the ACCC of the NEM Access Code.
- 4.2 The NEC has been reviewed and authorised by the ACCC under Part VII of the Act (in relation to the Part IV matters) and, other than Chapter 3 (subject to the discussion below) and NEC changes since the NEM Access Code was accepted by the ACCC, accepted as an Access Code for the purposes of Part IIIA of the Act.
- 4.3 In the case of an access undertaking, the ACCC can accept the undertaking if it is satisfied after having regard to various prescribed matters. One of the requirements for the acceptance of an undertaking is that the ACCC must have first:
- (a) published the undertaking and invited people to make submissions to the ACCC on the undertaking; and
 - (b) considered any submissions that were received within the time limit specified by the ACCC when it published the undertaking (section 44ZZA(4)).
- 4.4 The “access code” provisions in Part IIIA (section 44ZZAA) and the related provisions (section 44ZZA(4A)) were introduced as a consequence of the practical requirements and operation of the NEC. In fact, when the application for acceptance of the specified parts of the NEC as an access code was made, the required amendments to Part IIIA had not been passed.
- 4.5 An access code and an access undertaking are not the same and one does not stand in place of the other; in effect, they complement each other. If an access code is accepted by the ACCC, it means that when a participant under that access code proposes to give an access undertaking to the ACCC, the ACCC can accept that undertaking without complying with section 44ZZA(4) if the ACCC is satisfied that the undertaking is in accordance with that access code.

In essence, the fact that an access code may have been accepted by the ACCC does not remove the requirement for a participant to give the necessary access undertaking; it simply removes the public consultation process that otherwise would be required in relation to that access undertaking.

4.6 The effect of these provisions is that as the NEM Access Code has been accepted by the ACCC, an access undertaking that is in accordance with the NEM Access Code (being the form of access undertakings in Schedules 5.8 and 5.9 of the NEC) enjoys a “short circuit” route to acceptance by the ACCC (and, by extension prevents a third party from making an application to have the services declared under Part IIIA of the Act).

4.7 It is of fundamental importance to recognise the clear distinction and separation between an authorisation of a code under Division 1 of Part VII of the Act, on the one hand, and the acceptance of an access code under Division 6 of Part IIIA of the Act in relation to access to a service provided by a facility that would be uneconomical to duplicate and that is of national significance, on the other hand.

Further, the tests to be applied in each case are different. The test under Division 1 of Part VII is, broadly, a “net public benefit” test, with the principal public detriment being any anti-competitive effect. However, the principles to be applied by the ACCC in determining whether to accept an access code under Division 6 of Part IIIA are different and are broader.

Fundamentally, the tests developed under Division 1 of Part VII are intended to determine whether conduct should be permitted to be engaged in even though it may be anti-competitive for the purposes of Part IV. However, the principles developed under Part IIIA relate to a quite separate matter; namely, if access by a third party to a service provided by a facility is appropriate, what are the provisions that should regulate and govern the bases upon and subject to which that access will be given to third parties. This has nothing to do with competition or Part IV and this is made clear by s44ZZNA which provides that Part IIIA “does not affect the operation of Parts IV and VII”.

This is further confirmed by the note to s44ZZAA(1), which sets out examples of the kinds of things that might be dealt with in an access undertaking. All of them relate to access to the relevant service; none of them relate to anti-competitive detriment.

4.8 This means that the inference conveyed by the NECA Application that it would be convenient and “complete” to have the NEC “in its entirety” comprise the NEM Access Code, is based upon a flawed assumption that the general administration, supervision and operation of the NEC and the NEM Access Code should be combined and that this would be facilitated if the whole of the NEC (which is authorised in its entirety), also comprised the NEM Access Code. With respect to the NECA Application, administrative convenience or overall uniformity and completeness, are not grounds for provisions to form part of an access code for the purposes of section 44ZZAA of the Act.

5 Lack of Quantitative Support in the NECA Application

5.1 The NECA Application does not provide any quantitative support for any of the following issues or assumptions as set out in the NECA Application:

- The operation of the NEM and the inter-relationship between the market rules and access provisions is becoming increasingly greater.
- The reason why the variation sought under s44ZZAA(6) relates and extends to all other provisions of the NEC not subject to the Commission's approval of the NEM Access Code granted on 20 January 1999.
- The reasons why the NEC and the NEM Access Code need to be, or should be, treated or assessed according to the same or similar principles.
- How it is that the *whole* of Chapter 3 contributes part of the access regime for market network service providers.
- How it is that the *whole* of Chapter 3 "is effectively a condition of access for many connection applicants".
- The effect, or likely effect, upon the operation of the spot market (and related issues in Chapter 3) if it were subject to *both* Division 1 of Part VII of the Act (authorisation) and Part IIIA (third party access).
- The nature and scope of the operation of Division 6 of Part IIIA (access undertakings for non-declared services).

5.2 The NECA Application provides very little explanation and no justification for this approach other than "the operations of the NEM and the interrelationship between the market rules and access provision is becoming increasingly greater". Therefore, NECA seeks to vary the NEM Access Code to take account of "these developments and improve the administration of the NEM Access Code."

The NGF is not aware of any correspondence or material which explains in further detail the purported benefit or rationale for including Chapter 3 in the NEM Access Code. The comments that this would be sensible from a viewpoint of "completeness" does not add anything of substance to the NEM arrangements. In fact, it is submitted that "completeness" is irrelevant to the statutory framework set out in section 44ZZAA.

5.3 It is submitted that in the absence of NECA (as the industry body for the purposes of section 44ZZAA), providing quantitative support in its application for each of the above matters (and related or incidental matters), the ACCC is not in a position to assess NECA Application.

6 The nature of an application for variation of an industry code under s44ZZAA

6.1 Section 44ZZAA does not specify how the ACCC is to deal with, or assess, an application for variation under section 44ZZAA(6). In particular, section 44ZZAA is silent as to whether an application for variation can be only consented to by the ACCC after that public consultation process has been completed.

6.2 The position that has been adopted by the ACCC is as follows:¹

“However, normal administrative law principles would apply. In this context it is relevant that in assessing whether to accept an access code, the Commission is required to follow a public process, by publishing the code and inviting submissions, and to have regard to:

- (a) the legitimate business interests of providers who might give undertakings in accordance with the code;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of persons who might want access to the services covered by the code;
- (d) whether the service is already the subject of an access regime;
- (e) matters specified in regulations in particular:
 - (i) government legislation and policies relating to ecologically sustainable development;
 - (ii) social welfare and equity considerations, including community service obligations;
 - (iii) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
 - (iv) economic and regional development, including employment and investment growth;
 - (v) the interests of consumers generally or of a class of consumers;
 - (vi) the competitiveness of Australian businesses;
 - (vii) the efficient allocation of resources; and
- (f) any other matters the Commission thinks are relevant.

Part IIIA of the TPA does not provide a separate mechanism for parties to appeal the Commission’s decision relating to an application

¹ See, for example, the ACCC Decision to Vary the NEM Access Code dated 20 January 1999.

to accept, withdraw or vary an access code. More generally, however, a person can apply to the Federal Court for an order or declaration concerning the validity of any action performed under the TPA [s.163A]. Furthermore, the Commission's decisions are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1976*. Such a review would not go to the question of merit of the NEM access code but rather how the Commission's decision was made in terms of the provisions of the TPA and application of administrative law."

- 6.3 This approach as adopted by the ACCC confirms the need for the ACCC to be satisfied that:
- (a) an application for variation under section 44ZZAA(6) falls within the scope of Division 6 of Part IIIA; and
 - (b) if it does, that it would be appropriate to consent to the variation having regard to the matters set out above.
- 6.4 It is submitted that these requirements of administrative law as imposed upon the ACCC confirm that the information that has been provided to it by NECA in the NECA Application is deficient and that the ACCC cannot make an informed assessment upon either of the above matters with the information (or, more to the point, the lack of information) that has been provided to it by NECA.

7 The scope of Division 6 of Part IIIA

- 7.1 The NEC as a whole has been authorised under Part VII. This was a deliberate approach to deal with the fact that the NEC must be construed in its entirety and with necessary interrelationships between various provisions of the NEC, and conduct under them, so as to ensure that separate elements of the NEC could not be at risk of contravening a provision of Part IV by reason of having some association with or being a consequence of, other elements of the NEC.

However, acceptance of an access code and an access undertaking is constrained by the express limitation upon the scope of Part IIIA of the Act. An access code must be a written code which sets out "rules for access to a service". Similarly, an access undertaking must be a written undertaking "in connection with the provision of access to the service".

- 7.2 Section 44ZZAA(1) provides as follows:

"An industry body may give a written code to the Commission setting out rules for access to a service."

Section 44ZZAA(3) commences as follows:

"The Commission may accept the code, if it thinks it appropriate to do so having regard to the following matters:

[The particular matters specified in paragraphs (a) to (e)]

- (f) any other matters that the Commission thinks are relevant.”

Given the underlying purpose of a code for the purposes of s44ZZAA (ie to facilitate the giving of access undertakings by providers under s44ZZA), it is also appropriate to refer to s44ZZA(1) as follows:

“A person who is, or expects to be, the provider of a service may give a written undertaking to the Commission in connection with the provision of access to the service.”

Section 44ZZA(3), is in similar terms to s44ZZAA(3), except that the matters specified in the Trade Practices Regulations for the purposes of s44ZZAA(3) do not apply in relation to s44ZZA(3) and a matter to be taken into account by the ACCC under s44ZZA(3) is whether the undertaking “is in accordance with an access code that applies to the service”.

- 7.3 In the case of both a code and an access undertaking, that code or undertaking (as the case may be) must:

- specify a service or services;
- identify the relevant facility or facilities; and
- set out the rules for access to a service, including terms and conditions of access or procedures for determining terms and conditions of access.

- 7.4 It is also relevant to have regard to clause 6 of the Competition Principles Agreement in order to determine the scope of Division 6 of Part IIIA of the Act.

Clause 6(1) provides for the Commonwealth putting forward legislation “to establish a regime for third party access to services provided by means of significant infrastructure facilities” in the circumstances set out in that clause.

It is also relevant to take into account the principles set out in clause 6(3) in order to determine whether an access regime is an effective access regime for the purposes of Part IIIA. Those principles all relate to access to a service provided by a significant infrastructure facility and the terms and conditions upon which that access is to be granted.

- 7.5 Accordingly, it is submitted that the ACCC, acting as an administrative body, must not take into account any improper or irrelevant matters when assessing a code or a variation of a code submitted to it under section 44ZZAA. If the provision of the code (as proposed) is not a rule for access to a service or is not necessarily incidental to such a rule, or the effective workings of such a rule, it is submitted that the provision will be irrelevant and must not be:

- taken into account by the ACCC; or
- accepted as a provision of an access code or an access undertaking under Division 6 of Part IIIA of the Act.

- 7.6 Section 44ZZAA(3)(f) provides that the ACCC must have regard to “any other matters that the Commission thinks are relevant”.

However, a relevant matter must be one which relates to the proposed rules for access to a service. It would not be a relevant matter for the ACCC to accept as a provision of an access code a provision that is not a rule for access to a service or is not necessarily incidental to such a rule.

- 7.7 The NECA Application, by proposing that the whole of Chapter 3 of the NEC be included in the NEM Access Code, is not giving to the ACCC a proposed variation to a written code setting out rules for access to a service for the purposes of section 44ZZAA(1). For an application to vary a code under section 44ZZAA(6) to fall within the scope of section 44ZZAA, the proposed variations must be variations to existing rules for access to a service. It is clear that the whole of Chapter 3 cannot be so described.

8 The scope of the current NEM Access Code

- 8.1 The NECA Application provides that Chapter 3 of the NEC is being included in the NEM Access Code “for the first time”.
- 8.2 This raises the direct question of what is comprised in the NEM Access Code as accepted by the ACCC.

In this regard, the following observations can be made:

- (a) That the submission in support of the original application for acceptance of the NEM Access Code stated that the provisions of the NEC “which relate to access to network services are *principally* contained in” Chapters 4-9. In addition, the submission referred to those Chapters “together with relevant parts of Chapters 1, 2, 3 and 10 and such rules applying in the participating jurisdictions as must be complied with in relation to access to network services (by virtue of Schedule 5.8 and Chapter 9 of the NEC and found within “applicable regulatory instruments” as defined in the NEC). This combination was submitted to the ACCC for acceptance as an industry “access code” in accordance with section 44ZZAA of the Act. It was that combination of chapters and provisions which was defined in the submission as the “Industry Access Code”.
- (b) The ACCC decision to accept the Access Code (16 September 1998) made reference to the NEM Access Code being “principally comprised of Chapters 4 to 9 of the NEC but it also encompasses the relevant parts of the remaining parts of the NEC Chapters as well as the applicable regulatory instruments of the participating jurisdictions”.
- (c) In the ACCC decision to accept the NEM Access Code (16 September 1998), the ACCC described the distinction between the NEC (as a whole) and the NEM Access Code as follows:²

² At page xi.

“The Code is a single document which sets out the operational rules for the NEM. The Code comprises two distinct but inter-related elements: first, the wholesale electricity market rules; and second, the access arrangements to the transmission and distribution systems.

The market arrangements govern the operation of the electricity wholesale spot market and includes rules for: bidding processes by generators; determining the wholesale prices; central dispatch; settlement; prudential requirements; market information; inter-regional hedging; ancillary services; and market intervention by NEMMCO. These arrangements are not the subject of the access code but they were examined by the Commission as part of its authorisation of the NEM code.

In contrast to the arrangements governing electricity generation and its wholesale and retail sale, the access arrangements are the rules governing connection to and use of the physical wires infrastructure for the transport of electricity. The NEM access code (see Box 1 for more detail) can be characterised as a flexible set of arrangements covering the diverse matters relating to electricity connection and pricing while being broad enough to encompass all of a network’s customers (eg generators, users and retailers). This flexibility is necessary as, to a greater or lesser extent, every connection to an electricity network will impact on the performance of that network and therefore on other connected customers.”

8.3 “Box 1” referred to in the above quotation (appearing at page xii) describes the NEM Access Code as follows:

“The NEM access code is principally comprised of Chapters 4 to 9 of the Code but it also encompasses the relevant parts of the remaining NEC Chapters as well as the applicable regulatory instruments of the participating jurisdictions. Reflecting the need for flexibility, NECA has proposed an access code which specifies in some detail:

- the framework for achieving and maintaining a secure power system;
- the framework for generators and users to connect to an electricity transmission or distribution network ...;
- investments in networks (ie augmentation) ...;
- the pricing regulatory arrangements ...;
- the dispute resolution and enforcement mechanisms ...; and
- separate transitional arrangements for each of the participating jurisdictions.”

- 8.4 It is clear from these descriptions of the NEM Access Code *as accepted* by the ACCC, that:
- (a) there is a clear distinction between the wholesale electricity market rules and the access arrangements to the transmission and distribution systems, with the latter only being relevant to the NEM Access Code;
 - (b) the NEM Access Code extends beyond Chapters 4 to 9 of the NEC and includes “the relevant parts of the remaining NEC Chapters”;
 - (c) the ACCC accepts that the NEM Access Code (as accepted by the ACCC) contains and reflects a need for flexibility and that its provisions must be construed accordingly.

- 8.5 This means that the basic premise upon which the NECA Application is made, is false. That basic premise, as set out in the NECA Application is that:

“On 16 September 1998 the Commission accepted as an access code ... Chapters 1, 2, 4, 5, 6, 7, 8, 9 and 10 of Version 2.3 of the National Electricity Code”

That sentence fails to identify and reflect the broader description of the NEM Access Code and the express reference to flexibility in the ACCC’s acceptance of the NEM Access Code on 16 September 1998.

- 8.6 It is submitted that any relevant parts or provisions of Chapter 3 of the NEC are, and have been at all material times, included within the NEM Access Code and that it is not necessary to make any application to vary the NEM Access Code to include any relevant provisions of Chapter 3.

- 8.7 This construction of the NEM Access Code (as accepted by the ACCC) is consistent with the forms of undertaking set out in Schedules 5.8 and 5.9 of Chapter 5 of the NEC.

The undertaking in each of Schedules 5.8 and 5.9 relates to access to the relevant services. In each case it is provided that the Network Service Provider undertakes to maintain and make available its networks for access to the network services by NEC Participants in accordance with the requirements of the NEC and, in the case of Schedule 5.8, by all persons in accordance with “applicable regulatory instruments”.

Schedules 5.8 and 5.9 are drawn in terms that would encompass all provisions of the NEC (and, to the extent relevant, “applicable regulatory instruments”) that are relevant to, or are rules for the purpose of, access to services, including any relevant provisions contained in Chapter 3. This is consistent with section 44ZZA(4A) and the conduct of the ACCC in accepting undertakings in the form of Schedules 5.8 and 5.9.

For the ACCC to accept an undertaking in the form of Schedule 5.8 or 5.9 on the basis that the requirements of section 44ZZA(4) need not be complied with (which is provided for in section 44ZZA(4A)), the ACCC must be satisfied that “the undertaking is in accordance with an access code that is in operation at the time of acceptance”.

It must follow that the NEM Access Code, as accepted by the ACCC, includes the provisions of Chapter 3 that are “rules for access to a service” and that this is the view and practice of the ACCC. This means that the undertakings given under Schedule 5.8 or 5.9 should match the rules for access to services contained in the NEM Access Code.

9 Inconsistencies that would flow if the whole of Chapter 3 were to be included in the NEM Access Code

- 9.1 The principal inconsistency that would arise if the whole of Chapter 3 were included in the NEM Access Code is that the wholesale electricity market rules would fall within the concept of an access code (together with its rules for access to services) in circumstances where:
- the operation of the wholesale electricity market rules is distinct and separate from a service or a facility;
 - the wholesale electricity market rules operate, subject to the terms of the authorisation, in an environment of workable competition;
 - it is nonsensical to talk of access to the wholesale electricity market rules or to consider them as a service; they are the rules by which a free market operates;
 - a service is supplied or acquired within a market, the service is not a market and a market is not a service;
 - the terms and conditions by which the wholesale electricity market rules operate are set out in Chapter 3 of the NEC; they are not terms and conditions of access;
 - spot prices are determined within the wholesale electricity market by the operation of that market; it defies any conceptual reality to consider spot prices as a price or cost of access or as a price that is to be regulated or overseen in any way as if it were part of some access arrangement.
- 9.2 Accordingly, if the whole of Chapter 3 were to be included in the NEM Access Code, not only would such a decision by the ACCC be an administrative error and beyond power, it would create an inherent uncertainty as to the nature, regulation and oversight of the operation and workings of the wholesale electricity market in the NEM.