

Licensing Regime

Proposed Changes	Comments/ Proposals
<p>Section 6(ba) and section 9(ba)</p>	<p>The class of entities requiring licensing under section 9(ba) is too wide</p> <p>The amendment requires all agents and contractors of a transmission licensee involved in the management or operation of a transmission system (or any part thereof) used by the transmission licensee to transmit electricity to obtain a licence from the EMA. The scope of these amendments are extremely wide and include any party who contracts with any transmission licensee to perform any service or do any work, irrespective of whether the service or work relates to a significant or critical portion of the transmission system. Conceivably, parties who require licences could include parties engaged to:</p> <ul style="list-style-type: none"> (i) perform miscellaneous services e.g. switching services; (ii) maintain or carry out repairs on substations; or (iii) maintain or repair any apparatus or appliance used for, or for purposes connected with, the supply of electricity. <p>The ambit could also conceivably apply to SP Services Ltd, the Market Support Services Licensee by virtue of the provisions under the MSS Licence read with the MSS Code. Under the MSS Code, SP Services is required to provide certain services to the Transmission Licensee as agent.</p> <p>The amendments are overly onerous and exceed what is required to achieve the stated intention of regulating SPPG to ensure control over the grid infrastructure (see paragraph 2 of Consultation Paper).</p> <p>The scope of the amendments should be limited to agents who are involved in the management or operation of the whole of the transmission system used by the transmission licensee to transmit electricity.</p> <p>We therefore propose removing the reference to “contractor” and the reference to “or any part thereof”. Otherwise, the provision would capture SPPA’s contractors who would then need to be licensed or face criminal sanction. Such contractors would also then need to comply with the provisions of Sections 30A to 30E. And following licensing, such contractors would be subject to the onerous penalty provisions under the Act. This would have the effect of driving up the cost of doing business and would translate to higher costs for</p>

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	consumers. It would follow that the definition of “contractor” would need to be deleted.

Security Safeguards

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Section 30A	<p>The terminology utilised is unclear</p> <p>Where possible, the amendments should utilise terms defined in the Companies Act and definitions should be by reference to the definitions in the Companies Act. This will result in greater certainty and would avoid imposing an unnecessary compliance burden on licensees.</p> <p>For example, the 5% restrictions imposed under section 30A utilise the same 5% threshold for substantial shareholding imposed under the Companies Act. However, the computation of the 5% differs. The amendments to the Companies Act which came into force on 30 January 2006 introduced a concept of treasury shares. Following these amendments, the definition of “voting shares” in the Companies Act would appear to include treasury shares, however, for the purposes of determining whether a shareholder is a substantial shareholder under the Companies Act, the Companies Act expressly provides that treasury shares should not be included. Without a similar exclusion in the context of the proposed amendments, the phrase “voting shares” would presumably include a reference to treasury shares. Indeed, it would be preferable for the amendments to utilise a reference to substantial shareholder as defined in the Companies Act instead of imposing a 5% threshold.</p> <p>What is the definition of “holds” as used in the definition of “12% controller” and “30% controller”? Is this the same as having an interest in shares as defined under the Companies Act?</p> <p>Does “related corporation” under section 9(vii) have the same definition as under the Companies Act?</p>

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	<p>The regime adopted is overly restrictive</p> <p>Footnote number 2 to paragraph 3 of the Consultation Paper states that, in relation to the controls on ownership transfer, provisions which are similar to those set out in the Telecommunications Act have been adopted. However, the proposed amendments appear to adopt an approach which is different from that under the Telecommunications Act.</p> <p>While the Telecommunications Act imposes shareholding restrictions, the extent of these restrictions and the parties on whom the restrictions are imposed are different from those under the proposed amendments. The restrictions under the Telecommunications Act are based on a party's control (or possible) control of a designated telecommunications licensee and determined by reference to a party's direct and indirect legal and equitable ownership of voting shares where indirect ownership is determined using a sum the percentages methodology. The reach of the proposed amendments, on the other hand, extends to related parties by referring to the total interest held by a party and his associates. The term "associate" is very widely defined and includes related corporations and parties which control voting power of 20% or more.</p> <p>The ownership restrictions imposed under the proposed amendments are therefore significantly wider than under the Telecommunications Act. For example, under the Telecommunications Act, where A holds 20% of the voting shares of B and B holds 20% of the voting shares of C, A will be deemed to have 4% of the voting shares of C. Under the proposed amendments, A is deemed to be an associate of B and, by virtue of B's ownership of 20% of the voting shares in C, A will be deemed to be a 12% controller of C (since A and B together hold more than 12% of C), for which approval of the EMA is required. This is overly onerous and unnecessary since it is unlikely that, in a situation as above, A would be able to assert any or sufficient control over C to pose a security risk.</p> <p>Similarly, there is no necessity for a restriction on "indirect controllers" if a party's interest in shares is defined using the approach under section 7 of the Companies Act. This will avoid an unnecessary increase in the burden of regulatory compliance imposed on designated</p>

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	<p>electricity licensees.</p> <p>It is submitted that the regime under the Telecommunications Act is preferable and should be adopted instead. Please refer to the corresponding provisions in the Telecommunications Act sections 32A and 32B.</p> <p>Pro Forma Transactions</p> <p>The Code of Practice for Competition in the Provision of Telecommunication Services 2005 (S 87/2005) ("Telecommunications Competition Code) provides for various exemptions from the change of control provisions in relation to pro forma transactions such as liquidation and transactions which result only in a pro forma change (e.g. an assignment of interest from a parent corporation to a wholly owned subsidiary) or shares held as security. The Telecommunications Competition Code also introduces a different regime for share buybacks whereby no prior approval is required.</p> <p>To avoid over-regulation, pro forma transactions should similarly be excluded.</p> <p>It is not clear whether approval is required for existing shareholders</p> <p>It is not clear whether existing shareholders will require approval upon the enactment of the proposed amendments. This should be clarified.</p> <p>The definition of licensees holding licences under section 9(ba) as designated electricity licensees should not be automatic</p>

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	<p>The proposed controls would apply to all persons who hold licences under section 9(b) and (ba) – essentially all transmission licensees and their agents and contractors. Given the wide scope of section 9(ba), this is overly onerous. As mentioned earlier, we propose that the licensing requirements extend only to agents who are involved in the “management and operation of the transmission system used by the transmission licensee to transmit electricity”.</p> <p>The definition of designated electricity licensees should not be limited to transmission licensees and their agents/contractors</p> <p>The intention of the proposed sections 30A to 30G is to impose security safeguards in relation to ownership transfers which may be detrimental to national security. However, the proposed definition of designated electricity licensees is limited solely to transmission licensees and their agents/contractors. EMA may want to look into extending these provisions to apply to other market players whose installations are also critical to system security.</p>
Section 30B	<p>Section 30B should not apply to section 30A(1)</p> <p>Under section 30B(1), EMA may serve a written notice of objection on any person referred to in sections 30A(1), (2), (3) or (4) if EMA is satisfied that (i) any condition for approval under section 30A has not been met; (ii) the person has furnished false or misleading information or documents in connection with an application under section 30A; or (iii) EMA would not have granted its approval under section 30A had it been aware, at the time, of circumstances relevant to a person’s application for approval which are against the public interest.</p> <p>However, this is inapplicable to section 30A(1) since no approval is required under section 30A(1). In any event, any notice of objection issued in respect of section 30A(1) should be issued to the person acquiring the interest and not the designated electricity licensee.</p> <p>It should also be noted that, in the telecommunications industry, the ownership of an interest of less than 30% is presumed to not amount to an ability to exercise effective control (see section 10.3.6.1 of the Telecommunications Competition Code).</p>

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Section 30C	<p>There should be a clear distinction drawn between the types of directions which may be issued to an electricity licensee and those which may be issued to other persons</p> <p>A clear distinction should be drawn between the directions which the EMA may issue under section 30C(1) which are directed at parties acquiring an interest in a designated electricity licensee and the directions to be issued by the EMA under section 30C(3) which are issued to the designated electricity licensee (see section 32D of the Telecommunications Act for an example of such a distinction).</p> <p>The designated electricity licensee should be required to implement the restrictions under section 30C(3) only upon receipt of a direction from the EMA</p> <p>As presently drafted, the restrictions under section 30C(3) apply automatically upon the issue of a direction by the EMA under section 30C(1). However, there is no requirement that the EMA provide copies of notices issued by the EMA under section 30C(1) to the designated electricity licensee. The designated electricity licensee may therefore not be aware (and should not be under an obligation to determine) that such a notice has been issued and that compliance with section 30C(3) is required. It should be for the EMA to direct the designated electricity licensee to impose the restrictions set out in section 30C(3) in respect of a specified party's specified shares and for a specified period of time (as is the situation under section 32D of the Telecommunications Act).</p>
Section 30D	<p>Penalties for individuals and other entities who contravene section 30A are excessive</p> <p>Given that under the Telecommunications Act, the breach of an ownership restriction does not, per se, amount to an offence, it would seem that the creation of criminal offences and the imposition of fines and imprisonment under the proposed amendments is excessive. In any event, the powers granted to the EMA under section 30C are sufficient to address any security concerns which may arise from any unauthorised acquisition.</p>

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Section 30E	<p>The provisions are overly restrictive</p> <p>We fail to understand why EMA requires such a provision. The following are our reasons: (a)The current regulatory framework already provides EMA with extensive powers to regulate the licensee and how it is run. (b) Furthermore, from a corporate governance perspective, the effect of these changes would be to indirectly undermine the decision making authority of the shareholders in determining the composition of the Board, and the Board’s authority in appointing its Chairman, Directors and CEO; (c)The SP group of companies already has good corporate governance practices in place that are akin to listed companies. This includes a board nominating committee to select and screen potential directors. If EMA’s concern is security-linked, there are other controls which may be more appropriate eg. security screening. EMA may want to consider looking at similar provisions in other jurisdictions, eg Victoria, Australia.</p>
Section 30F	<p>The scope of the amendment is overly wide and would result in excessive regulation and be unduly restrictive</p> <p>The restrictions imposed under section 30F are in relation to any part of a transmission system, irrespective of how insignificant a part this may be. For example, the definition of transmission system includes “electric lines” which in turn is defined to include “any electricity cable” which is any length of insulated single conductor and all other apparatuses or devices connected thereto. The same would apply to substations. It would be unduly restrictive to require the prior approval of the EMA for the disposal or acquisition of electricity cables and substations (including the leasing of substations). This cannot be the intention of the EMA. The scope of section 30F(1) should therefore be narrowed.</p> <p>Acquisitions by a transmission licensee should be excluded</p> <p>Any acquisitions of or of any interest in a transmission system (or part thereof) or the entry by a transmission licensee into a lease or contract for hire as lessee or hirer should not require prior approval since such transactions do not pose any security risks and would instead enhance the transmission system.</p>

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	<p>Clarify that decommissioned assets are excluded</p> <p>Where a transmission licensee has decommissioned and no longer has a requirement for a part of a transmission system, the transmission licensee should be free to dispose of such asset and a third party should be free to acquire such asset (e.g. equipment which has been replaced). This should be expressly specified in the amendments.</p>
Section 30G	<p>The Minister's powers under section 30G should be limited to situations where there has been a breach of section 30F</p> <p>Although section 30G is drafted primarily towards any contravention of section 30F, the language of section 30G is such that the Minister is entitled to issue an order under section 30G to any person who owns a transmission system (or any part thereof) if the Minister is satisfied that "it is in the interest of the security and reliability of the supply of electricity to the public" or if "it is in the public interest" to do so. This could include situations where section 30F does not apply and no breach of section 30F has occurred. Given the wide powers which are granted to the Minister under section 30G, the exercise of such powers should be limited to situations where section 30F applies.</p>

Power to Obtain Information

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Section 4(1)	<p>The EMA's exercise of powers under the Electricity Act should be limited to situations where it is performing its functions and duties under the Electricity Act</p> <p>The proposed amendment to section 4(1) provides the EMA with the power to obtain documents and information where reasonably required by the EMA to carry out the functions or duties assigned to the Authority under "other written law". It is inappropriate for the EMA to be granted powers under the Electricity Act to seek information for purposes unrelated to the EMA's functions and duties under the Electricity Act or as assigned by the Minister under the Electricity Act. Accordingly, the words "or other written law" should be removed.</p>
Section 4(5A)	<p>EMA should only be entitled to retain copies of documents</p> <p>The proposed amendment provides the EMA with the power to keep both originals and copies of documents furnished to it. There is no limit on the duration for which the EMA can keep such documents nor does the Act provide for an avenue by which a person may seek to obtain the return of such documents. Given the various statutory duties imposed on entities to retain records, the power granted to EMA should be limited to a power to retain copies only, as is the case under the Telecommunications Act.</p>
Section 5(4)	<p>The original reference to "confidential basis" found in the current section should be retained as we would require information to be provided on that basis.</p>

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	<p>Presently, in relation to directions and decisions of the EMA made under Part VII, appeals may only be made to the Appeal Panel whose decision is final.</p> <p>It is submitted that this opportunity should be taken to amend the appeal process in relation to directions and decisions of the EMA under Part VII to align it with the process provided for under the Competition Act, that is, to provide for a further right of appeal from the decision of the Appeal Panel to the High Court and the Court of Appeal.</p>

Any other comments or feedback

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	<p>All typographical and numbering errors should be corrected</p> <p>For example:</p> <ul style="list-style-type: none"> (a) there is no subsection (i) under section 30A(9); (b) the word “and” at the end of sub-paragraph (a) of the definition of “equity interest” under section 30A(8) should be moved to the end of sub-paragraph (b); (c) there are 2 subsections numbered (ix) in section 30A(9); and (d) there is no subsection (a) in sections 30C(1) and 30D(1).