

21 January 2005

Manager – Energy Market Reform Team
National Energy Market Branch
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

Dear Sir/Madam,

Submission – Draft National Electricity Law and Rules

Eraring Energy wishes to make this submission in relation to issues arising under the draft National Electricity Rules (“Rules”) and draft National Electricity Law (“NEL”). Eraring understands that the MCE has indicated a desire to receive submissions under the NEL by 7 January and under the Rules by 28 January. Eraring presumes the reason for dividing the submission process is to focus attention on the different issues raised in the two publications and to assist in the redrafting process. In the case of liability issues, however, Eraring’s concerns with some of the provisions in the draft NEL have only crystallised now that Eraring has conducted a fuller review of the Rules. The issues raised in this submission therefore stem from concerns in relation to both the draft Rules and the draft NEL. Eraring expects that the MCE will therefore be able to take account of the concerns raised in this submission in both its considerations in relation to the Rules and in relation to the NEL.

Extension of “Officer” liability

Current position

Clause 2.8.1 of the Code states that:

“A Code Participant must comply with the provisions of the Code applicable to that Code Participant.”

Clause 8.5.7 of the Code states that:

“The act or omission by a partner, agent, officer or employee of a Code Participant constituting a breach of the Code shall be deemed for the purpose of clause 8.5 [being enforcement] to be the act or omission of the Code Participant concerned.”

In other words, the effect of clause 8.5.7 is that liability for breach of the Code provisions lies with the Code Participant rather than with the individual performing the act or omission on the Code Participant's behalf. The rationale for this position is no doubt consequent on the fact that a corporate entity can only act via its officers, employees and agents and on the principle of vicarious liability (that the corporate entity should be responsible for the acts and omissions of persons acting on its behalf).

Proposal

It has been proposed by the MCE that Clause 8.5.7 of the Code is deleted and instead section 85 is included in the draft NEL. This states:

“(1) If an officer or employee of a relevant participant commits an act in their capacity as officer or employee of the relevant participant that would, if that act were committed by the relevant participant, constitute a breach of a civil penalty provision, that relevant participant is taken to have contravened that provision.

(2) In this section –

“officer” means a director of the relevant participant or a person who is otherwise concerned in the management of the relevant participant.”

Section 85 differs from clause 8.5.7 in that section 85 extends liability to a relevant participant for actions of the employee or officers of that participant whereas clause 8.5.7 replaced the liability of the partner, agent, officer or employee with the liability of the Code Participant. It seems clear to us that under common law principles of vicarious liability the relevant participant would be liable for the acts of its employees and officers so the statutory extension of liability is probably not required. Of more concern is the fact that the new regime appears to endorse concurrent liability for both the relevant participant and persons, being officers or employees, acting on the relevant participant's behalf.

Concurrent liability also arises under section 84 which states that:

“(1) If a corporation contravenes an offence provision or is in breach of a civil penalty provision, each officer of the corporation is to be taken to have contravened the offence provision or to have been in breach of the civil penalty provision if the Officer knowingly authorised or permitted the contravention or breach.

(2) An officer may be proceeded against under an offence provision or civil penalty provision pursuant to the section whether or not the corporation has been proceeded against under the provision.

(3) Nothing in this section affects the liability of a corporation for a contravention of an offence provision or for a breach of a civil penalty provision.

(4) In this section –

“officer” means a director of the corporation or a person who is otherwise concerned in its management.”

Although this section largely repeats section 80 of the current NEL, the presence of clause 8.5.7 of the Code currently makes it clear that the primary liability for breach of Code provisions lie with the Code Participant. So far as we are aware, officers of Code Participants have not been proceeded against in their personal capacity by NECA utilising section 80. In other words, the effective current position is that there is no officer liability for civil breaches of the Code (because of clause 8.5.7).

By contrast, section 85 removes the protection currently given to persons acting on a Code Participant's behalf, with the result that such persons could now be proceeded against concurrently with the relevant participant or in place of the relevant participant. We assume that the removal of the protection granted in clause 8.5.7 is inadvertent given the MCE's statements in the Information Paper released in December 2004 that:

"It is important to note that the changes proposed in the new NEL and Rules are not aimed at changing the regulatory obligations that are currently placed on participants in the national electricity market. Rather, the changes provide for a more appropriate governance framework for the market and facilitate the conversion of the Code into Statutory rules. Accordingly, the substantive rights and obligations on participants in the market under the current NEL and current Code will remain the same in the new NEL and Rules."

Submission

(a) Deletion of clause 8.5.7 of the Code

Eraring Energy agrees that it is no longer appropriate to include clause 8.5.7 in the Rules as enforcement provisions have been moved to the NEL.

(b) Inclusion of section 85 in the NEL

Eraring Energy considers that the principle enshrined in clause 8.5.7 of the Code should be carried over to the NEL and in particular that section 85(1) should be revised as follows:

"(1) If an officer or employee of a relevant participant commits an act or omission in their capacity as officer or employee of the relevant participant that would, if that act were committed by the relevant participant, constitute a breach of a civil penalty provision, that relevant participant is taken to have contravened that provision and the act shall be deemed, for the purpose of Part 6, to be the act or omission of the relevant participant rather than the act or omission of the officer or employee."

(c) Section 84 of the NEL

Eraring Energy considers that section 84 of the NEL constitutes an unwarranted piercing of the corporate veil. It is reasonable and appropriate to have provisions which render officers of a corporation liable for criminal offences committed by the corporation where they are knowingly concerned in the criminal offence. However, civil liabilities of a corporation ought to remain liabilities of the corporation. The case has not been made out for a piercing of the corporate veil in relation to civil liabilities. Corporations, rather than their officers, ought to be liable for the civil debts and obligations of the corporation (except as provided in relation to the Corporations Act itself).

The extension of civil liability to officers in section 84 of the NEL is unwarranted; and therefore section 84 of the draft NEL should be amended by deletion of the references to “civil penalty provisions”, and instead confined to “offence” provisions.

Extension of liability to any “person” for aiding and abetting

Current position

Under the current NEL and Code there is no head of liability equivalent to section 66(1).

Position proposed by MCE

Section 66(1) of the draft NEL introduces a new offence of aiding abetting, counselling or procuring a breach or being in any way directly or indirectly knowingly concerned in or party to a “civil penalty provision”. This new offence is directed at a “person”.

The extension of liability to any person for aiding and abetting does not appear to have been flagged in the Information Paper or consultation sessions. As indicated above given the MCE’s comments that the:

“the substantive rights and obligations on participants in the market under the current NEL and current Code will remain the same in the new NEL and Rules”

and the fact that a policy case has not been made out for personal liability in relation to breaches of civil penalty provisions, Eraring does not support the introduction of this new offence.

Eraring is also concerned that this new offence is directed at any “person” aiding abetting, counselling or procuring a breach or being in any way directly or indirectly knowingly concerned in or party to a “civil penalty provision”. Arguably, liability for a civil breach could extend to a large number of employees within the relevant participant’s organisation. Eraring is unaware of other legislative regimes imposing personal liability on such a wide class of persons in relation to breaches of civil provisions. Eraring does not therefore support the extension of liability for breaches of civil provisions to such a wide class of persons.

Submission - Inclusion of section 66(1) in the NEL

Eraring does not support the introduction of section 66(1) in the draft NEL. Section 66(1) of the draft NEL ought to be deleted.

Alternatively, if the MCE is not persuaded to delete section 66(1) from the NEL in its entirety, Eraring recognises that there may be a case for seeking to limit liability for “aiding and abetting” offences to those concerned with criminal offences and not breaches of the civil provisions.

Finally if the MCE is not persuaded to delete section 66(1) from the NEL, nor to limit it to criminal offences, and assuming the MCE is not persuaded to revise section 85 as requested in 1.3 above then Eraring supports the view that section 66(1) offences should

be directed at “officers” of the relevant participant rather than at all “persons” in any way concerned in a breach.

Definition of “officers”

Current position

The current position reflects the proposed position and is discussed in 3.2 below.

Position proposed by MCE

In both the draft NEL (section 84) and the current NEL (section 80) an “officer” is defined as:

“a director of the corporation or a person who is otherwise concerned in its management.”

In contrast, section 77A of the existing NEL and sections 118 and 119 of the draft NEL define “officer” for the purposes of immunities as:

“a person who is an officer within the meaning of section 9 of the Corporations Act 2001 (Cth).

These two definitions are quite different. The definition in section 84 of the draft NEL could extend to cover general managers and any person concerned in the management of the corporation. By contrast the definition in the Corporations Act is more specific and thus much narrower in the persons covered. Of relevance it includes:

“a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation);”

In other words, the Corporations Act definition is directed at the top level of management only and specifically excludes professional advisers. There is a body of case law defining who may fall within the definition. In contrast, there is great uncertainty surrounding the scope of the definition set out in section 84.

Submission on definition of “officer” in Part 6 of the NEL

Eraring supports a revision to Part 6 to define “officer” in a consistent manner with that used in Part 9, namely adopting the definition in section 9 of the Corporations Act 2001.

Should you require any further information from Eraring Energy in relation to this submission, please contact Robert Burns, Manager Market Development on 8268 4237

Yours faithfully,

G F GROVE WHITE
MANAGING DIRECTOR