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Dear Sir

## EXPOSURE DRAFT OF THE NATIONAL ELECTRICITY LAW

Macquarie Generation appreciates and supports the extensive work undertaken by the Ministerial Council on Energy (MCE) and the MCE Standing Committee of Officials (SCO) in redrafting the National Electricity Law (NEL), as detailed in the Exposure Draft published on 1st December 2004.

Macquarie Generation believes that the new arrangements should improve overall regulatory oversight of the energy sector by ensuring that the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) have functions and responsibilities that are clearly defined and without conflict. The Corporation agrees with the following key changes to the regulatory framework:

- The revised process for amending the market rules should provide a more timely process for reviewing and finalising rule change requests. The AEMC will be entirely responsible for consulting with industry and justifying any amendments to the rules. Provided the AEMC is appropriately staffed and resourced, this should enable the rules to evolve in response to market and industry developments without unnecessary delay.
- The new market objective should provide sufficient guidance for the AEMC, and for any judicial review of an AEMC decision, provided that there is recognition that it is an economic test and that economic efficiency is the overriding goal when assessing rule changes. Legal advice prepared for Macquarie Generation recommends the inclusion of a statement in the second reading speech for the NEL to make this intent explicit.
- The separation of responsibility for setting the rules for transmission determinations from responsibility for making revenue decisions should provide greater certainty for transmission network service providers and registered participants.

While Macquarie Generation endorses the overall package of reforms embodied in the proposed NEL, the Corporation has comments and queries on some of the specific detail in the exposure draft.

### **Functions and powers of the AER**

Section 14(g) of the proposed NEL states that the AER may have “any other functions and powers conferred on it under this Law, the Regulations and the Rules.”

Macquarie Generation believes that it is inappropriate to allow an expansion of the functions and powers of the AER simply through the making of a regulation. Under the proposed arrangements there is little if any discipline of the regulation making process given that the *Subordinate Legislation Act 1987* (SA) does not apply to NEL regulations. Regulations can be made without any review of the merits of the proposal.

The regulation making powers should be limited to minor procedural matters. Any substantial change to the functions of the economic regulator should be subject to parliamentary scrutiny through amendments to the NEL or through the AEMC’s rule making process.

Having an industry specific regulatory structure with multiple regulators is an arrangements faced by only a few industries. There should not be scope for an expansion of the functions and powers of the enforcement agency without at least some checks and balances on the potential regulatory impost for the energy sector.

### **Infringement notices**

Clause 8.5.4 of the existing Code outlines procedures for dealing with alleged breaches of the Code. The clause provides that NECA must notify a Code participant of an alleged breach and details of the sanctions which may be imposed if the breach is established. The procedures give all Code participants an opportunity to provide relevant information and data to NECA so as to challenge any allegation.

The procedures for managing breaches of the Code are now incorporated in the proposed NEL including powers for the AER to issue infringement notices. Unlike the current procedures that apply to NECA, the AER is not required to give notice to participants of an alleged breach for which the AER intends to issue an infringement notice.

Macquarie Generation believes that the new arrangement reduces procedural fairness for participants. The redrafting of the Code into market rules should not remove existing safeguards for participants. All participants should have the opportunity to defend their actions without having to go through costly court proceedings.

### **Sharing and gathering information**

The SCO information paper on the NEL, December 2004, states that “each of the AEMC, AER and ACCC is empowered to share information that it obtains with each of the other bodies where that information is relevant to the functions of those other bodies.”

Macquarie Generation believes that it would be difficult, if not impossible, for any memorandum of understanding to adequately control information flows between the regulatory bodies to ensure that information is only provided where it is relevant to the functions of another regulator.

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No other industry sector is subject to an arrangement whereby there is sharing of information between regulators. The establishment of an industry specific regulatory regime should not diminish the rights and protections of energy businesses relative to the rest of the business community. Commercial-in-confidence data provided to a regulatory agency should only be provided to another agency with the permission of the business.

Macquarie Generation has concerns that the information gathering powers of the AER as set out in the NEL may be more extensive and intrusive than those that apply more generally to the ACCC and ASIC. The establishment of the AER under Commonwealth statute could give rise to an enforcement agency with a mission to aggressively pursue breaches of the rules. While this is not a criticism of the new structure, the information gathering powers of the AER should be appropriate for the materiality of problems that may arise and the type of investigations that may be necessary. Macquarie Generation intends to comment on this issue in detail in the next round of submissions on the NEL.

#### **Process issues**

Macquarie Generation considers that it is not possible to finalise changes to the NEL without also considering industry feedback on the market rules. The new arrangements must be considered as a package as there may be unanticipated problems with the rules that require amendment to the NEL to resolve.

Macquarie Generation would appreciate the opportunity to participate in the NEL pre-finalisation hearing on 7th January 2005.

Yours faithfully

Signed: G V Every-Burns

G V EVERY-BURNS  
CHIEF EXECUTIVE  
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24th December 2004