



7 April 2004

Streamlining of the Code Change Process
c/- MCE Market Reform
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

By email: MCEMarketReform@industry.gov.au

Dear Sir/Madam

MCE MARKET REFORM – STEAMLINING OF THE CODE CHANGE PROCESS

Tarong Energy Corporation Limited (*Tarong Energy*) is pleased to make the following submission in respect of the MCE Discussion Paper on Streamlining of the Code Change Process dated March 2004 (*the Discussion Paper*).

From the outset Tarong Energy wishes to express its broad support for the Ministerial Council on Energy's (*MCE's*) proposal to limit the overlap of functions between the National Electricity Market (*NEM*) institutions by streamlining the current Code Change Process. Tarong Energy is of the strong view that the lack of transparency, accountability and efficiency in the existing Code Change Process is hindering the ongoing development and improvement of the NEM.

Whilst generally supportive of the proposal Tarong Energy wishes to express the following concerns:

Referral of Code Change Proposals to the ACCC

The Discussion Paper provides that:

"[F]or competition-related proposed code changes, it is proposed that the AEMC would have the discretion to apply to the ACCC for authorisation under Part VII of the TPA and for industry access code approval under Part IIIA of the TPA." (section 12).

The Paper also provides that at the preliminary stage of assessing a Code change proposal, the AEMC may reject the proposal because, amongst other things, it "fails to demonstrate a prima facie net benefit". (section 2) Therefore, a decision by the AEMC to either reject a proposal on competition grounds at the preliminary stage or not to refer the matter to the ACCC for authorisation effectively means that the AEMC has stepped in the shoes of the ACCC.

Tarong Energy has a number of concerns relating to this process, namely:

- (a) the risk of legal challenge faced by market participants caused by the AEMC providing pseudo authorisations under the Trade Practices Act (this concern is equally relevant in circumstances where the ACCC

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makes an informal decision during the preliminary stages that there are no potential competition or access issues without going through the requisite ACCC authorisation process as is currently required under the TPA); and

- (b) that it is contrary to legal advice that the Code in its entirety is an authorised instrument under the TPA and that any changes to the Code would likewise require the ACCC to re-apply the net public benefits test and re-authorise the entire document.

We refer you to the NGF submission on this point for further particulars.

Proponent Involvement in the Process

The Discussion Paper proposes giving the AEMC the power to:

- (a) make minor amendments to the code change proposal and proceed to gazette the amended code change;
- (b) amend the code change proposal and consult on the amended proposal; or
- (c) withdraw the code change proposal. (section 12)

Tarong Energy feels it is imperative that the proponent of the proposed code change be consulted at each stage of the AEMC decision making process and be given the option to withdraw their proposal if the AEMC makes any amendments to the original.

The “Net Benefit” Test

The proposed code change process incorporates a “net benefits” test, eg. by the AEMC at the Preliminary Assessment stage. It is assumed that this test is identical to that which applies in the TPA for competition-related authorisations under Part VII and Part IIIA access approvals. This needs to be clarified.

Public Forum for Category 4 Changes

The Discussion Paper provides that interested parties may call for a public forum by either the AEMC or the proponent of the code change. Tarong Energy believes that for proposed category 4 code changes (ie. that affect protected provisions of the Code) the public forum should be automatically triggered. This is because of the gravity of such proposed code changes.

NEMMCO Involvement

Section 7.4 of the Discussion Paper provides that in assessing a proposed Code change the AEMC will undertake economic, legal and engineering analysis. The ACCC and the AER have been specifically identified as institutions which may be consulted by the AEMC for competition and regulatory related advice. However, it is ironic that the institution which has been given a statutory charter for the operation of the market and system, namely NEMMCO, does not get a mention. Accordingly, Tarong Energy considers that NEMMCO should be consulted to provide the AEMC with specialist advice relating to whether a proposed code change may have negative impacts to the ongoing operation of the market.

Merits Review

It is proposed that decisions of the AEMC be subject to judicial review on questions of law (section 13). The Discussion Paper does not, however, propose to allow merit based appeals. This is contrary to the existing provisions of the Trade Practices Act which allows for de novo merits based reviews for certain reviewable decisions. Before removing this existing right there should be a clear case made that merits based appeals of AEMC decisions are not appropriate.

As previously mentioned, while Tarong Energy has some concerns with the details of the proposed code change process we are supportive of the general theme towards a more efficient and streamlined process and look forward to reviewing a further detailed draft of the proposal.

If you have any queries regarding any matter raised in this letter please do not hesitate to contact us.

Yours sincerely



Greg Hesse

SENIOR MANAGER PHYSICAL MARKETS & REGULATORY AFFAIRS

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