



Ref: 367/43/19

6 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

DRAFT NEW NATIONAL ELECTRICITY LAW (NEL)

Tarong Energy Corporation Limited (TEC) is pleased to make this submission in respect of the draft new National Electricity Law (NEL). It seems clear that the draft new NEL gives effect to the various conclusions reached by the Ministerial Council on Energy (MCE) during the past two years. However, there are several areas of the legislation where TEC believes improvements can be made to provide greater clarity of process and reduce regulatory uncertainty. These areas for improvements are set out below.

Development of MCE Statements of Policy Principles - s. 7(1)

The ability for Ministers to direct the development and operation of the NEM through the issuance of binding statements of policy principles is very significant and powerful. Given the potential for the MCE to fundamentally alter the dynamics of the market through such statements we find the lack of a formal specified process for the creation of such statements a little unsettling. This is not to deny the right of governments to determine policy direction, however the potential for exclusion of public debate and analysis prior to the issuance of a statement of policy principles can only increase the degree of regulatory uncertainty.

There is no guidance in the legislation as to at what level of detail a statement of policy principles will be pitched. Also, the definitions in the draft new NEL make it clear that the MCE is not bound to follow any particular process in developing a statement of policy principles. The definition of the MCE is of a Council of Ministers "acting in accordance with its own procedures". While the Information Paper states that matters affecting national policy, legislation and governance arrangements require unanimous approval we are left to assume that other matters will be determined by simple majority. Moreover, there is no assurance that these arrangements will remain fixed or that any changes to internal MCE procedures will be made public.

We believe that as a minimum, the legislation should specify the voting rules that are to apply for the issuing of statements of policy principles.

Consistency of Statements of Policy Principles with the National Electricity Market Objective - s. 7(2)

The stated policy, as described in the Information Paper, is that MCE statements of policy principles must be consistent with the national electricity market objective. This must be the case because the AEMC may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national electricity market objective¹. However, it appears that the legislation as drafted may not conclusively ensure this outcome. It is not clear what would happen if an MCE statement of policy principles was inconsistent with the national electricity market objective. At the very least it would increase the regulatory risk faced by participants, including potential new investors in electricity infrastructure.

Given the potentially serious downside risks that arise from any inconsistency between statements of policy principle and the national electricity market objective it is perhaps surprising that the draft new NEL provides for only a subjective test of this consistency. Instead of requiring that a statement of policy principles must be consistent with the national electricity market objective, the draft new NEL only requires that the MCE must be satisfied that it is consistent. That is, the subjective view of members of the MCE becomes the test rather than an objective assessment of consistency.

In the interests of long-term regulatory certainty for participants and investors we suggest this section of the draft new NEL be changed to provide for an objective test of consistency which reflects the stated policy in this regard. That is, a statement of policy principle may only be issued by the MCE if it is consistent with the national electricity market objective. The introduction of an objective test such as this would make the statements of policy principle more amenable to judicial review to confirm their consistency with the national electricity market objective.

Incorporation of Definitions from the National Electricity Rules

The draft new NEL contains many definitional sections, some of which simply replicate the definitions contained in the National Electricity Rules (NER). For example the definition of NEMMCO in section 2 of the draft new NEL matches the revised definition of NEMMCO in Chapter 10 of the NER. However the NEL also uses many technical terms which, while defined in the NER, have no definition specified in the NEL. Examples include the terms *transmission system* and *distribution system* used in section 10(2) of the draft new NEL.

¹ New NEL, s.87(1)

TEC believes it is important that terms such as these are clearly defined within the primary legislation. It would not be appropriate to simply rely on definitions contained within the NER because they can be changed without parliamentary oversight. TEC recommends that where a term used in the draft new NEL is already defined within the NER, that definition be replicated within the draft new NEL. Provision should also be made to put beyond doubt that where there is an inconsistency between a definition in the NEL and a definition in the NER the definition in the NEL prevails.

Should you have any queries in relation to this submission please contact me on the numbers below or email Greg.Hesse@tarongenergy.com.au

Yours faithfully



Greg Hesse
SENIOR MANAGER, PHYSICAL MARKETS AND REGULATORY
AFFAIRS

Enquiries:

Telephone (07) 3228 4352
Facsimile (07) 3228 4319