

20 August 2007

Dr John Tamblyn
Australian Energy Market Commission
Level 16
1 Margaret Street
SYDNEY NSW 2000

Dear John,

Registration of Foreign Based Persons and Corporations as Trader Class Participants

Thank you for the opportunity to make this submission.

BP Energy Asia (**BPEA**) is seeking to have clause 2.5A(b) of the National Electricity Rules (**Rules**) amended so as to remove the requirement that Traders be resident, or have a permanent establishment, in Australia.

The removal of this requirement creates some issues that we think the Commission should be cognisant of:

1. **Compliance Monitoring and Enforcement** – The absence of an operational presence in one of the participating jurisdictions means that foreign-based Traders cannot be treated in the same manner as local Traders.

Any investigation of a suspected breach of the Rules would be a difficult exercise for the Australian Energy Regulator. At first glance, this might appear to be no more than an inconvenience in light of the few Rules obligations imposed on Traders at present, but it is possible that the scope of their obligations in the future alters to make this a more serious issue.

2. **Recovery of outstanding fees and charges** – Foreign-based Traders pose a unique problem for NEMMCO in the context of debt recovery.

As the Commission would be aware, Traders who bid successfully for settlements residue units are required to pay for their acquired units prior to distribution. Should a Trader fail to pay, NEMMCO might need to take legal action for breach of contract to recover the outstanding fees.

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If NEMMCO needed to take recovery action against a foreign-based Trader, it would need to balance the cost of recovery (being the cost of instigating legal action, securing judgement and then seeking enforcement overseas with its attendant costs and risks) against the benefit, which will always be the outstanding amount less the difference between party/party and solicitor/client legal costs.

As NEMMCO operates on a non-profit basis and with an efficiency imperative, it is unlikely that NEMMCO will be in a position to seek recovery from foreign-based Traders unless the benefits clearly outweighed the costs, and the costs and risks of recovery from foreign-based Traders are likely to be far in excess of the costs of recovery against local Traders. This could mean that NEMMCO is not in a position to take recovery action against a defaulting foreign-based Trader unless the quantum of fees to be recovered is so high as to warrant the risk and cost of recovery.

- 3. Jurisdiction** – As you are aware, the National Electricity Law is based on a co-operative multi-jurisdictional legislative framework. Where a foreign-based Trader is concerned, it would be difficult to delineate which of the participating jurisdictions' legislation would be the 'correct' legislation to which that foreign-based Trader would be required to submit.

This would cause difficulty for NEMMCO and, potentially, others, should it ever be necessary to take legal action against a foreign-based Trader. This has consequences for both choice of forum as well as legislation.

We understand that the provisions by which eligibility for registration of Market Participants and Traders were constructed in this manner so as to ensure that enforcement was possible in the most effective and efficient manner.

- 4. Service of Process** – As BPEA states in its proposal, foreign-based counterparties such as itself can enter into over-the-counter derivative contracts in Australia. It would be our understanding that in those circumstances, such entities are usually (if not always) required to appoint a "process agent" within the jurisdiction the relevant contract is governed by and that the appointment of such "process agents" is also usually required to be irrevocable. NEMMCO suggests that any right granted to foreign-based entities to participate in the NEM as Traders be subject to a similar requirement.
- 5. Propriety of Rule Change vs Derogation** – A Rule change that relaxed the requirements for eligibility would apply to both substantial organisations such as a subsidiary of a multinational, as well as shelf companies. Traders are Market Participants and could have significant financial liabilities to NEMMCO; permitting them to operate entirely offshore could permit organisations, such as shelf companies, entry to the market.

In NEMMCO's submission, the Commission should consider whether an application such as this is addressed more appropriately by way of derogation, rather than a Rule change.

We are happy to meet with you to discuss this submission at your convenience.

Yours sincerely,



Brett Hausler
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