Introduction

We thank EnergyCo for the opportunity to comment on the Draft guidelines on orders prohibiting connection to network infrastructure in Renewable Energy Zones (the Draft Guidelines). Section 29 of the Electricity Infrastructure Investment Act (the EII Act) is a powerful tool, and we appreciate the effort of EnergyCo in developing draft guidelines to shape its implementation.

The Clean Energy Council (CEC) is the peak body for the clean energy industry in Australia. We represent and work with over 1,000 of the leading businesses operating in renewable energy and energy storage. We are committed to accelerating Australia’s clean energy transformation.

There are over 31 operational solar and wind farms operating across New South Wales, with a further 16 large-scale projects currently under construction worth around $3.1 billion in capital value and creating around 2,600 jobs. With the introduction of the NSW Renewable Energy Zones (REZs) there will be an increase in the number of projects in concentrated areas, meaning more investment and jobs, but also cumulative impacts.

The CEC supports the objects of the EII Act, noting in particular its aims to improve the reliability and supply of electricity and to reduce risk for investors, alongside fostering community support for new projects. We see community support as a very important issue for the industry and have established a Best Practice Charter1, signed by over 50 companies that develop large-scale projects, along with detailed guides on community engagement2 and community benefit sharing,3 in order to help maintain support within host communities.

However, while we support the objects behind s. 29 of the EII Act, we are concerned about how this power may play out practically and consider that it risks introducing additional subjectivity and confusion, and increases risk for investors. We welcome the Draft Guidelines as an opportunity to reduce these risks. In this submission we set out some feedback on the Draft Guidelines and the implementation of section 29 of the Act.

Intersection between s.29 and existing project assessment processes

One of the CEC’s primary concerns is that the Draft Guidelines establish a new process for project assessment outside of the existing process under the Environmental Planning and Assessment Act 1979 (EP&A Act). The EP&A Act permitting process is the only consent pathway available to projects over 30 MW. It is currently unclear what the interplay is between the Department of Planning &
Environment’s (DPE) determination of the Development Application under the EP&A Act and s.29 and the Draft Guidelines.

The Draft Guidelines specify that EnergyCo’s power to invoke a s.29 order is available up until a Development Approval decision has been made by DPE. While the process mapped out in the Draft Guidelines provides multiple opportunities for the project proponent to respond to concerns, this whole process occurs, and is potentially decided upon by EnergyCo, without consideration of an Environmental Impact Statement, Social Impact Assessments or the Response to Submissions Report that are involved in the DPE process under the EP&A Act framework.

The EP&A Act process already includes a comprehensive, triple bottom line assessment including extensive community consultation and detailed consideration of any environmental, social and economic impacts.

We submit that the s.29 process should be inherently linked with the EP&A Act process. Firstly, this will avoid any confusion or uncertainty by having two completely separate processes. Secondly, EnergyCo should not be able to make decisions without being required to take into consideration the formal assessment process, assessment outcomes and assessment recommendations of DPE. We also submit the Draft Guidelines should address how EnergyCo will interact with projects that have an application in process under the EP&A Act.

Additionally, we consider that the Draft Guidelines are unclear on what happens to a project after EnergyCo issues an order to prevent connection to REZ infrastructure. Is the project able to still work through the permit process under the EP&A Act and is the s.29 order retracted if the permit is achieved? If s.29 is intended to a “project-ending” decision, then this should be explicit in the guidelines, and indeed it should only be invoked in connection with existing EP&A Act processes.

**Elements of the draft process**

If, despite the concerns articulated above, EnergyCo intends to proceed with a process separate in both time and inputs from the EP&A Act process, then the Draft Guidelines provide a reasonable framework and series of events. Specifically, we acknowledge the relative transparency that EnergyCo provides to project proponents and the opportunities afforded to those project proponents to respond to concerns. However, we reiterate our concerns that the proposed process likely occurs before the project proponent would have completed the environment and social impact assessments as part of the EP&A Act process, arguably putting the project proponent at a disadvantage.

One specific element that could be improved is in the “initial consultation with the proponent”, articulated in Section 4.3 of the draft Guidelines. We submit this should be a required step for EnergyCo, not an optional step. The draft Guidelines currently say “the infrastructure planner may initially consult with the Proponent of the project” (italics added). We recommend changing this to “the infrastructure planner must initially consult...”. This will help avoid uncertainty in the process and gives the Proponent an opportunity to respond/explain prior to wider consultation.

Beyond these important procedural matters, our central concern with the implementation of s.29 relates to the interpretation of the terms in sub-section (4). That is, “the infrastructure planner must not make an order unless satisfied that –

(a) There is significant opposition from the community in the local area to the proposed infrastructure; and
(b) Making the order is *reasonably necessary to maintain community support in the local area for other infrastructure* in the renewable energy zone; and
(c) Making the order is *in the public interest*.

We have italicised in the above extract some of the terms where interpretations will be critical to the reasonable use of s.29, and below we elaborate on these points. We also note that the word ‘and’ at the end of each point in the legislation indicates that all three of these criteria need to be satisfied.

1. “Significant opposition”

We submit that a very high threshold must be applied to this phrase. Many projects face some level of community opposition, but we submit that the mere presence of opposition, even organised opposition, should not in and of itself satisfy this standard of “significant opposition”.

We submit that to amount to “significant opposition”, the opposition must be:

- Very broad and nearly unanimous
- Not only from those in a very particular location (e.g. adjacent to the project) or those representing only a particular set of interests
- On the basis of significant issues – demonstrable issues that have a tangible impacts that are informed by expert analysis and evidence
- Not on the basis of perceived impacts that are not supported by credible analysis.

Consideration should be given to the availability of reasonable mitigation measures that would address community concerns. In other words, if the significant opposition is on the basis of an impact that can be reasonably mitigated, then a more appropriate solution, rather than invoking the power of s.29, would be to require the mitigation as part of the development approval.

We consider that EnergyCo’s assessment should focus on the issue, not the presence or absence of opposition. This helps proponents and stakeholders engage constructively to ideally resolve concerns.

2. “Community in the local area”

Section 4.4 of the draft guidelines note that s.29(8) of the EII Act defines “local area” as “the area in which the proposed infrastructure will be located”. The articulation of s.29(3)(c) of “the local council in the local area” indicates that the “local area” is a narrower geographic space than the local government area. We support this, on the grounds that local government areas can cover large areas with diverse populations. Opponents from the far side of a local government area should not be able to block a project that has support of those closer to it.

Further, we submit that this clause should be interpreted as those in the community who are exposed to the actual impacts of the project.

3. “Reasonably necessary to maintain community support… for other infrastructure”

The CEC has communicated in a number of formats the view that state governments have an important role to play in building and maintaining community support in Renewable Energy Zones (REZs). The very notion of REZs is that these drive a geographic concentration of projects, in order to obtain technical and economic efficiencies in grid augmentation. The consequence, however, is that
REZs also create a geographic concentration of impacts, which may lead to concerns about cumulative impacts.

Where there is strong opposition to a project or multiple projects, perhaps because of concern about cumulative impact, it is hard to see how EnergyCo can convince itself that an order under s.29 will necessarily maintain community support for other projects or grid infrastructure. In the event of multiple similar projects in close proximity, we are concerned that there may be an approach of creating a “sacrificial project”, even though each individual project’s impacts may not be particularly problematic.

4. “In the public interest”

In its consideration of whether issuing an order under s.29 is “in the public interest”, EnergyCo should expressly consider the following issues:

- The need to replace retiring coal-fired power stations
- The contribution of renewable energy to providing more reliable electricity
- The contribution of renewable energy to providing cheaper electricity
- The urgency of action on climate change, and
- Other Objects of the EII Act.

Conclusion

It is our view that the justification of a separate process that runs in advance of the existing project assessment framework under the EP&A Act has not been made out. While the draft process by itself and in isolation would represent a reasonable process, its existence alongside the EP&A Act process will create confusion and increase investor risk, all while potentially leaving EnergyCo in the position of making project-ending decisions without the full range of information that would be provided by the project proponent under the EP&A Act process.

**We submit that any invocation of s.29 should be inherently linked to the existing EP&A Act process, rather than via a new, separate and duplicative process.**

Further, we note that the draft guidelines do not provide any guidance on how to interpret the terms in s.29(4) of the EII Act.

**We submit that, given the nature of the penalty, the powers under s.29 should only be invoked in the most egregious circumstances, in the face of nearly unanimous opposition from the community closest to the project that is based on anticipated actual impacts of the project.**

Thank you again for the opportunity to provide comment on the draft guidelines. We are happy to provide any further information that may be useful to your deliberations.

Regards,

Dr Nicholas Aberle
Director – Energy Generation & Storage
Clean Energy Council
naberle@cleanenergycouncil.org.au