South Australian Chamber Of Mines & Energy

19 April 2024

Attn: Mr Michael Malavazos
Director, Energy Regulation
Department for Energy and Mining

Via email: hre@sa.gov.au

Dear Mr Malavazos

Re: Hydrogen and Renewable Energy Act Regulations

The South Australian Chamber of Mines and Energy (SACOME) is the leading industry association representing the resources and energy sector in South Australia; the powerhouse of the State's economy.

Accordingly, decisions and regulations that impact our sector must be considered in this statewide context and with a view to prioritising its long-term economic viability.

To inform this submission, SACOME consulted widely among its members. SACOME welcomes the opportunity to provide comment on the draft Hydrogen and Renewable Energy Act Regulations ('the Regulations'), which support the recently enacted *Hydrogen and Renewable Energy Act* ('the Act'), and we thank the Department for its engagement on this reform.

As stated in SACOME's submissions to both the Discussion Paper and the draft Hydrogen and Renewable Energy Bill, SACOME broadly supports the intent of the Act. Our feedback concerns the following matters:

- Data reporting requirements
- The prescriptiveness of the Regulations
- The absence of grandfathering provisions
- Uncertainty regarding costs

All of these matters create significant uncertainty for industry.

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SACOME encourages the State to prioritise its competitiveness against other jurisdictions and cautions against the inclusion of prescriptive Regulations for an industry in its infancy. The economics of green hydrogen projects remain unproven, with high power prices the major barrier to the establishment of green hydrogen projects at scale across the country.

To ensure the Act achieves its primary objective of facilitating hydrogen and renewable energy projects, our regulatory regime needs to support these projects in becoming viable; not adding unintended and unnecessary burdens.

Data reporting requirements

From the outset, it is important to consider the appropriateness of mirroring the reporting requirements from the Energy Resources Act to the chemical and power generation industry. Excessive reporting and the implications of competitive company information being made public will impact the attractiveness of South Australia as an investment destination.

Recommendation

SACOME recommends the Department engage in further targeted consultation with industry to identify what information the State actually requires, noting, for example, that hydrogen production is an economically marginal business and being the lowest cost operator is critical for success.

It is recommended that baseline data stay with a Release Area to ensure future optionality and expedite any later assessments and studies.

SACOME's submission in respect of the draft Bill queried the application of the Bill to freehold land, noting the delineation of obligations and rights was unclear.

SACOME therefore welcomed the Bill as introduced into Parliament, which distinguished between permit holders and licensees. However, s 8(5)(b) required that permit holders comply with the criteria prescribed by the Regulations and s 115(2)(c) enabled Regulations to provide that a provision of this Act applying to licences or licensees applies to a permit or the holder of a permit.

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Section 8 of the Regulations addresses the application of provisions of the Act to renewable energy feasibility permits and by reference to Schedule 1 of the Regulations applies the following substantive provisions of the Act to permit holders as if they were licensees:

S 43 – Bond and security
SS 46-48 – Reporting requirements and public liability insurance
S 49(1) – Alteration of size of [permit] area
S 50 – Dealing with [permits]
S 54 – Minister may suspend or cancel [permits]
S 55 – Surrender of [permits]
S 83 – Minister may request information
S 89 – Production of records
S 90-92 – Compliance and enforcement provisions
S 108(2)(a) – Inclusion of information on the Hydrogen and Renewable Energy Register

It is disappointing that industry feedback that appeared to have been accepted when the draft Bill was settled has been disregarded, with the same obligations now being imposed by way of Regulation.

While the application of some of these requirements to permit holders could be considered uncontroversial, the requirement to provide a report, information, or material at prescribed times (s 46(1)) – i.e. every 6 months as per Regulation 25 – is regarded as excessive and inappropriate as the activity itself is located on freehold land.

Moreover, this provision requires the disclosure of sensitive and valuable proprietary information (for example, wind and other meteorological data from a meteorological mast) in circumstances where the permit holder has invested significant resources, time and cost into obtaining access rights to collect that data, and where there is no apparent regulatory or enforcement purpose being served by its submission to the Minister.

Recommendation

SACOME strongly recommends that s 46 be removed from Schedule 1.

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The prescriptiveness of the Regulations

The objects of the Act are enumerated in s 3 of the Act: *inter alia*:

- to facilitate and regulate exploration for, and exploitation of, renewable energy resources;
- to establish an effective, efficient and flexible regulatory framework; and
- to facilitate economic prosperity and benefits for the State through the development of an industry for generating hydrogen and renewable energy.

Indeed, the Minister's press release of 16 November 2023 quotes him as follows: "*marks a significant milestone in the state's energy transition, and in our journey as a leader in the clean energy revolution and the economic opportunities it provides*".

It is SACOME's submission that the drafting of the Regulations in their current state is so overly prescriptive in respect of the requirements for the preparation of and consultation on documents as to leave any decisions in respect of those documents susceptible to judicial review applications by activists in a bid to frustrate developments under the Act.

This is similar to the lawfare currently being experienced by the oil and gas industry (where accusations of failures to meet the prescriptive requirements of regulations for the content of documents or consultation processes have been used as grounds to overturn decisions to accept or approve those documents). Activism against large-scale renewable developments, particularly wind farms, is also on the rise and has already frustrated several projects in South Australia.

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Recommendation

SACOME recommends much of the detail in the Regulations regarding the content of Regulations 30 (Environmental impact report), 31 (Statement of environmental objectives), 32 (Consultation on proposed statement of environmental objectives) and 34 (Operational management plan) be removed from the Regulations and delegated to a guidance note to enable the Department's expectations to still be communicated while at the same time allowing the Act to facilitate the development of a renewable energy and hydrogen industry, rather than frustrate it.

In the alternative, SACOME recommends that a subjective test for meeting the obligations in the Regulations be included to mitigate the prospect of successful judicial review applications – e.g. criteria to be met "to the Minister's satisfaction". This approach is consistent with the Government's evident intention to facilitate development swiftly and terms that it considers appropriate.

Grandfathering provisions

SACOME and industry understood from the previous round of consultation on the draft Bill that appropriate transitional provisions and 'grandfathering' would take place in respect of existing operational assets, or assets under development that have already lodged applications under *the Planning, Development and Infrastructure Act* ('PDI Act').

SACOME considers that existing operations would benefit from greater certainty beyond that of consultation in the event of overlapping tenure.

Existing operational assets have six months to submit an Operational Management Plan for a licence. SACOME submits that pursuant to s 115(3)(b) that further transitional provisions are made in the Regulations to extend this timeframe to three years, as they have been and continue to be regulated appropriately.

Further, the Department has previously released a table of proposed transitional provisions (in July 2023) that provided for, *inter alia*:

1) Rights to apply for extensions of time and variations under the PDI Act for three years after the commencement of the HRE Act;
2) A waiver of HRE Act licence fees for three years after a licence grant; and
3) No requirement for a bond or security under the HRE Act

for projects that are approved under the PDI Act or are being assessed under the PDI Act. A copy of this table is *appended* to this submission.

We have not been able to identify any provisions in the Act or the draft regulations that provide for these matters.

Recommendation

SACOME strongly recommends that these transitional provisions as previously produced by the Department be incorporated into the Regulations prior to the Act coming into operation.

Interaction with existing Regulations

The new regulatory regime is intended to serve as "one window to Government" and yet obligations will be found in delegated legislation under other Acts.

Appropriate amendments need to be made to existing Regulations, such as the Native Vegetation Regulations, to ensure consistency with the Act and the existing approval processes that apply to renewable energy projects. SACOME and industry are yet to see copies of the same, but understand from the Department that drafting is currently in train.

Recommendation

SACOME recommends appropriate referral legislation be drafted to ensure the Act does operate as "one window to Government" and that copies of all amending Regulations be circulated to industry prior to the commencement of the Act.

Uncertainty regarding costs

Industry expressed significant concern regarding the annual rent framework for designated land; specifically, the uncertainty created by the capacity for a rental offer to be made pursuant to s 11 of the Act that outbids a rental determination made by the Minister, based on factors such as underlying site value, land access, and the capacity of the relevant project.

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Such a process has the potential to significantly increase the costs of a potential project for applicants at a time when project approvals for large-scale renewable developments are stalling in South Australia and across the country.

The Government should instead be seeking to foster a stable and certain regulation framework that encourages development.

Recommendations

SACOME recommends the Regulations be amended to provide flexibility to only levy or scale this cost burden once the industry is established.

Moreover, rental fees should not be payable for permits or the Renewable Energy Feasibility Licence stage.

Competing projects for the same Release Area should be assessed and distinguished using metrics rather than rent payable to Government and done in a way that advances the overall objectives of the Act.

General comments

SACOME members were strongly of the view that rather than provide industry with the clarity and certainty they were seeking from the Regulations, the obligations for applicants and licensees were more onerous, duplicative and prescriptive than expected.

In addition to the legal risks caused by the same, anecdotal feedback is that the new framework was already operating as a disincentive to investment in large-scale renewable energy projects.

In summary, SACOME recommends:

1. The Department engages in further targeted consultation with industry regarding the extent of data reporting requirements;

2. The removal of s 46 from Schedule 1 of the Regulations;

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3. The contents of Regulations 30, 31, 32 and 34 be the subject of a guidance note to mitigate the prospects of a successful judicial review application, or, in the alternative, provisions allowing for a subjective assessment by the Minister to guard against the same;

4. The transition provisions as previously published by the Department be incorporated into the Regulations prior to the Act coming into operation;

5. Appropriate referral legislation be drafted to ensure the Act operates as "one window to Government";

6. The Regulations be amended to only levy rental offers once the industry has been established; and

7. Rental fees should not be payable for permits or Renewable Energy Feasibility Licences.

Thank you once again for providing SACOME with the opportunity to comment on these Regulations, and we look forward to further engagement prior to their settlement.

Yours sincerely

Rebecca Knol
Chief Executive Officer

Enc: Department for Energy and Mining document entitled *Proposed transitional provisions for hydrogen and renewable energy projects after the commencement of the HRE Act.*

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Proposed transitional provisions for hydrogen and renewable energy projects after commencement of HRE Act.

Project scenario	Continued rights under PDI Act	HRE Act transitional provisions
Project approved under the PDI Act and now operating	• Approval under PDI Act to remain lawful (grandfathered) and subject to conditions of consent. • Rights to apply for extensions of time and variations under PDI Act for a 3-year period after HRE Act commencement.	• Submission of an Operational Management Plan under the HRE Act must occur within 6 months after HRE Act commencement (or within a time specified by the Minister). • Grant of REIL or HGL licence, subject to DEM acceptance of the Operational Management Plan. The project has continued rights to operation until a determination on the plan is made by DEM. • Waiver of HRE Act licence fees for a 3-year period after licence grant. • No requirement for bond or security under the HRE Act.
Project approved under the PDI Act, but not operating	• Approval under PDI Act to remain lawful (grandfathered) and subject to conditions of consent. • Rights to apply for extensions of time and variations under PDI Act for a 3-year period after HRE Act commencement.	• Submission of an Operational Management Plan under the HRE Act must occur and be accepted by DEM before project operation begins. • Grant of REIL or HGL licence, subject to DEM acceptance of the Operational Management Plan. • Waiver of HRE Act licence fees for a 3-year period after licence grant. • No requirement for bond or security under the HRE Act.
Development application lodged under the PDI Act, but not yet determined	• Rights to continued assessment under the PDI Act. • Approval under PDI Act (if received) to remain lawful and subject to conditions of consent. • Rights to apply for extensions of time and variations under PDI Act for a 3-year period after HRE Act commencement.	• Submission of an Operational Management Plan under the HRE Act must occur and be accepted by DEM before project operation begins. • Grant of REIL or HGL licence, subject to DEM acceptance of the Operational Management Plan. • Waiver of HRE Act licence fees for a 3-year period after licence grant.
Project obtained (or seeking to obtain) Crown sponsorship, but development application under the PDI Act not yet lodged	• To be assessed and licensed under the HRE Act. • Where information has been prepared to satisfy PDI Act requirements, the information will be considered to satisfy HRE Act requirements.	• To be assessed and licensed under the HRE Act. • The assessment pathway under the HRE Act is intended to be at least equivalent to a Crown development assessment pathway in terms of requirements, timeframes (expected to be shorter under the HRE Act) and consultation.

Note 1: Conditions of consent imposed under a PDI Act approval relating to project operation (including decommissioning) are to be reflected in an Operational Management Plan or equivalent plan submitted as part of the transitional requirements under the HRE Act. It is proposed that compliance assessment for these operational conditions will be undertaken by DEM under the HRE Act, while remaining conditions relating to planning and construction will continue to be assessed by DTI-PLUS under the PDI Act. An administrative arrangement between DEM and DTI-PLUS will clearly determine agency responsibilities in assessing compliance with the conditions of consent under the PDI Act to avoid any duplication.

Note 2: The proposed transitional provisions are a modified process compared to the licence application process under the HRE Act – i.e., common provisions for licence applications will not apply, instead the acceptance of an Operational Management Plan is the only requirement before REIL licence grant for projects captured by the proposed transitional provisions. Furthermore, the project operator will not be required to prepare new Statement of Environmental Objectives for the operations.

Note 3: An operational management plan, means a plan that satisfies requirements proposed in Section 53(2) of the HRE Act, to: specify the operations to be undertaken under the licence, specify how operations under the licence will be managed, including details of the management systems and controls, and contain any other information and comply with any other requirements as prescribed by the regulations. An existing 'Safety, Reliability, Maintenance and Technical Management Plan' under the *Electricity Act 1996* and 'Operational Environmental Management Plan' required by condition under a PDI Act approval will be considered by DEM to satisfy the operational management plan requirements under the HRE Act.

Note 4: As above, variations for projects approved under the PDI Act may be assessed under that Act up until 3 years after the commencement of the HRE Act. Variations under the PDI Act are limited to the scope of the original PDI Act approval and are subject to planning assessment by DTI-PLUS. Any variation beyond this scope after commencement of the HRE Act must be applied for under the HRE Act.

Note 5: As above, extensions of approvals for projects already approved under the PDI Act may be considered under that Act up until 3 years after the commencement of the HRE Act. Extension of time applications under the PDI Act are subject to assessment by DTI-PLUS and may consider project advancements that have occurred, changes to policy or legislation, the number of previous extension of time approvals, among other considerations on a case by case basis.

Note 6: Term of a REIL licence proposed in the updated HRE Bill to be 50 years.

Note 7: Licence fee amounts to be consulted on separately and prescribed in the HRE Regulations. A nominal fee is proposed that is only intended to cover the state government's administration of the HRE Act.

Note 8: Battery energy storage systems (BESS) that are standalone will not require licensing under the HRE Act and hence are not subject to these transitional provisions.

DEM = Department for Energy and Mining

HRE Act = Hydrogen and Renewable Energy Act (proposed)

REIL = Renewable Energy Infrastructure Licence

HGL = Hydrogen Generation Licence

DTI-PLUS = Department for Trade and Investment, Planning and Land Use Services

PDI Act = Planning, Development and Infrastructure Act 2016 (replacing the Development Act 1993)

Department for Energy and Mining, July 2023