

National Electricity Law (Schedule to the *National Electricity (South Australia) Act 1996*) and the National Electricity Rules applied as a law of New South Wales by the *National Electricity (New South Wales) Act 1997*

BETWEEN

Snowy Hydro Limited ACN 090 574 431

Applicant

and

National Electricity Market Management Company Limited ACN 072 010 327

Respondent

DECISION ON PRELIMINARY QUESTIONS
OF THE DISPUTE RESOLUTION PANEL

(Sir Anthony Mason AC KBE, Mr G. E. Fitzgerald QC and Mr G.H. Thorpe)

1. The applicant, Snowy Hydro Limited (“Snowy”), alleged in an Adviser Referral Notice dated 17 July 2006 (“the Notice”) that on 31 October 2005 the respondent, National Electricity Market Management Company Limited (“NEMMCO”):

- (a) *breached the National Electricity Rules (“NER”);*
- (b) *failed to follow the central dispatch process and thereby made a number of scheduling errors; and*
- (c) *caused Snowy loss and damage for which NEMMCO is liable to compensate Snowy.*

2. In para. 3.3 of the Notice Snowy claimed that, by reason of the matters set out in the Notice and the resultant alleged breaches of the NER and/or scheduling errors, Snowy is entitled to:

- (a) *a determination that NEMMCO has breached the NER and/or has failed to follow the central dispatch process (ie. has made one or more scheduling errors);*
- (b) *payment of compensation from the Participant compensation fund in respect of the scheduling errors;*

- (c) a determination that NEMMCO pay a monetary amount to Snowy in respect of the loss and damage suffered by Snowy;
- (d) a determination that NEMMCO pay Snowy's costs incurred in respect of the dispute resolution process; and
- (e) such further or other determinations as the Dispute Resolution Panel ('DRP') considers appropriate.

3. As Snowy acknowledged in its oral presentation, para. 3.3(c) of the Notice does not overlap with para.3.3(b). Paragraph 3.3(c) relates only to alleged actions by NEMMCO that are not scheduling errors but which Snowy asserts constitute breaches of the NER entitling it to compensation from NEMMCO's assets rather than from the Participation Compensation Fund. Particulars are provided in Snowy's Statement of Facts and Contentions dated 14 August 2006 in paras.6(c) to (g) which state:

- (c) failed to issue appropriate dispatch instructions within the meaning of clause 4.9.2 of the Rules and to take appropriate action consequent upon the failure of various generators to respond to dispatch instructions and otherwise conform with the Respondent's requirements;
- (d) failed to take appropriate action regarding the ramp rate capability bid and/or the ramp rate achieved by various generators;
- (e) failed to operate the central dispatch process in such a way as to, and otherwise failed to, maintain power system security;
- (f) failed to achieve the NEMMCO power system security responsibilities in accordance with the power system security principles; and
- (g) failed to issue appropriate directions or instructions under the Rules and/or the *National Electricity Law (Schedule to the National Electricity (South Australia) Act 1996)* (the NEL) to maintain the power system in, or to re-establish the power system to, a secure, satisfactory and/or reliable operating state.

4. Snowy's claims have been referred to a Dispute Resolution Panel ("DRP") that has been established for that purpose.

5. It is common ground that, subject to procedural issues raised by NEMMCO, the DRP has power under the National Electricity Law ("NEL") and the NER to make a determination that NEMMCO pay compensation to Snowy from the Participant Compensation Fund in respect of scheduling errors, as claimed in para.3.3(b) of the Notice. Snowy and NEMMCO are in dispute about whether scheduling errors occurred and, if so, the amount of compensation that is payable by NEMMCO to Snowy from the Participant Compensation Fund.

6. NEMMCO also disputes Snowy's entitlement to the additional compensation claimed by Snowy in para. 3.3 (c) of the Notice. According to NEMMCO, it has immunity in respect of that claim by virtue of s 119(1) of the NEL.

7. Snowy and NEMMCO have requested the DRP, as presently constituted, to determine the following question as a preliminary issue:

Does s 119(1) of the National Electricity Law apply so that NEMMCO does not incur liability in relation to the Applicant's claim, set out in para. 3.3(c) of the Adviser Referral Notice dated 17 July 2006, for a determination by the Dispute Resolution Panel that the Respondent pay a monetary amount other than out of the Participant compensation fund in respect of the loss and damage alleged to have been suffered by the applicant?

8. Snowy, but not NEMMCO, has requested the DRP also to determine as a preliminary issue the following additional question:

'In respect of the scheduling error claims under clause 3.16.2 of the Rules is the Dispute Resolution Panel in determining compensation payable from the Participant compensation fund limited to considering only spot market trading losses?'

9. One of NEMMCO's objections to the DRP answering the second question (set out in the previous paragraph) is that the parties' submissions have not addressed matters that are stated to be critical to the proper construction of cl.3.16.2(d) which, it is correctly said, cannot be ascertained only from its language without reference to its context and purpose, including policy considerations that are said to be discernible in the NEL and NER. In the absence of full argument, the DRP considers that it should give effect to this objection and decline to answer the second question.

10. That leaves the first question (set out above in para.7) for determination at this stage of the dispute.

11. Snowy does not allege either bad faith or negligence by NEMMCO, that NEMMCO's alleged actions that are not scheduling errors entitle Snowy to compensation independently of the NEL and NER or that its claim in para.3.3(c) of the Notice could have been instituted in a court: see s.59 of the NEL. The foundation of Snowy's claim in para.3.3 (c) of the Notice appears from paras.5 and 6 of its Outline of Argument, which provide:

"5.Clause 8.2.1(a) of the Rules provides that a DRP is empowered to consider and determine a dispute about any of the matters listed in sub-paragraphs (1) to (8) of that clause. The dispute, so far as it relates to breaches of the Rules that are not scheduling errors, concerns the failure by the Respondent to interpret or apply the Rules correctly (clause 8.2.1(a)(1) and/or the Respondent's refusal to compensate the Applicant concerning the Respondent's failure to meet its obligations under the Rules (clause 8.2.1(a)(5)).

6.Clause 8.2.1(d) of the Rules provides that, in connection with a dispute about any of the matters listed in sub-paragraphs (1) to (8) of clause 8.2.1(a):

The dispute resolution processes may indicate that a breach of the Rules has occurred and the resolution or determination of the dispute may take account of the damage thereby caused to a party.

The Rules therefore specifically envisage that, provided the dispute falls within the scope of clause 8.2.1(a), the DRP, in its determination of the dispute, may take account of the damage suffered by a party to the dispute as a result of any breach of the Rules which is relevant to the dispute. Put differently, a dispute concerning a breach of the Rules may be considered and determined by the DRP provided that the dispute is about one or more of the matters set out in clause 8.2.1(a). The present dispute is such a dispute.

12. NEMMCO does not dispute the DRP's power to decide Snowy's claim in para.3.3(c) of the Notice: see cll 8.2.1(a)(1), 8.2.6B, 8.2.6C and 8.2.6D(d)(3) of the NER. However, NEMMCO contends that Snowy's claim in para.3.3 (c) of the Notice must fail because of the immunity granted NEMMCO by s119(1) of the NEL, which provides:

“119-Immunity of NEMMCO and network service providers

(1) NEMMCO or an officer or employee of NEMMCO does not incur any civil monetary liability for an act or omission in the performance or exercise, or purported performance or exercise, of a function or power of NEMMCO under this Law or the Rules unless the act or omission is done or made in bad faith or through negligence.”

13.(a). The term “*Civil monetary liability*”, used in ss119(1), is defined in ss119(7) of the NEL as a “*liability to pay damages or compensation or any other amount ordered in a civil proceeding, but does not include liability to pay a civil penalty under this Law, an infringement penalty under Division 5 of Part 6 or the costs of a proceeding.*”

(b) Clause 10 of Schedule 2 to the NEL defines “*proceeding*” as “*a legal or other action or proceeding*”.

14. Snowy accepts that its claim in para.3.3(c) of the Notice is a “civil” claim which, if successful, would result in a determination by the DRP giving rise to a liability on NEMMCO “*to pay damages or compensation*”: see s72 of the NEL, cll.8.2.1(f), 8.2.6D(d)(3) and (e) and 8.2.9(c) and (d) of the NER and ss71(2) of the NEL and ss28 and 33 of the Commercial Arbitration Act 1984 (NSW). Nonetheless, Snowy contends that ss119(1) of the NEL has no application to its claim in para.3.3(c) of the Notice because ss119(1) applies only to civil proceedings in courts, not to claims for determination by a DRP. According to Snowy, a claim for determination by a DRP is not a “proceeding” and a determination by a DRP that “NEMMCO pay a monetary amount .. in respect of .. loss and damage”, as claimed in para.3.3(c) of the Notice, would not constitute an “order” that NEMMCO do so.

15. Each of the words that are central to Snowy's argument, namely, “proceeding” and “order”, is capable of a range of meanings. The meaning each bears in a particular setting depends on the context. Further, cl.7 of Schedule 2 to the NEL provides that, in interpreting ss119(1), the interpretation that best achieves the purpose or object of the NEL is to be preferred. As stated in the joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ in **Bankstown v Alamo** (2005) HCA 46 at (29), ss.119(1) must be

construed by reference to “*the subject, scope and purpose of the whole of the statutory text*”.

16. Snowy’s argument impermissibly seeks to attribute meanings to individual words in a definition, “proceeding” and “order”, without regard to the terms, subject or purpose of ss119(1) into which that definition is imported. Importantly, ss119(1) grants NEMMCO an “immunity”, which is a well-understood legal concept. The word “immunity” is entirely unsuitable if ss119(1) is directed merely to ensuring that particular claims are excluded from courts but not DRPs. Further, the division of jurisdiction between courts and DRPs is contained in Part 6, not ss119(1), of the NEL.

17. Moreover, it would be highly artificial to deny the description “proceeding” to Snowy’s claims for determination by a DRP. This is plainly “*a legal or other .. proceeding*” and hence a “*proceeding*” as defined in cl.10 of Schedule 2 to the NEL. Both the NEL and NER assume the word “*proceeding*” is apt to describe a DRP “*proceeding*”. So does para. 3 of Snowy’s Outline of Argument, which states: “*The NEL and the Rules establish particular arrangements for dispute resolution by a Dispute Resolution Panel (the DRP) which apply to the participants¹, and are limited to them, on the one hand, and on the other, contemplate access to the general courts of criminal and civil jurisdiction which are available to all, and in which any enforcement of the Rules, or determinations by a DRP, would be undertaken. .. the heading to Part 6 of the NEL “Proceedings under the National Electricity Law” is apt to refer to both types of proceeding.*” See also cl.8.2.6C of the NER.

18. Snowy’s argument that a DRP determination is not an “order” is similarly unpersuasive. Courts and judges are not the only bodies and persons who make orders. For example, legislation establishing or recognising tribunals, even private “tribunals” such as arbitrators, commonly refers to their binding decisions as orders.

19. Further, the construction of ss119(1) of the NEL for which Snowy contends is incompatible with the wider statutory context and “*the subject, scope and purpose of the whole of the statutory text*”: **Bankstown v Alamo**.

20. Two questions obviously arise. First, what purpose would be served by limiting the “immunity” granted by ss119(1) in the manner for which Snowy contends? Second, what operation would ss119(1) have if it was limited in that manner?

21. No cogent answer was given by Snowy to either question.

22. If, but for ss119(1), a claim such as Snowy’s claim the subject of para.3.3(c) of the Notice could be instituted in either a court or a DRP, an immunity from the claim only in courts leaving it able to be pursued before a DRP would be an “immunity” of little, if any, practical value.

¹ Including NEMMCO for present purposes.

23. Further, as Snowy acknowledged, independently of ss119(1) no court has jurisdiction to determine its claim in para.3.3(c) of the Notice. Nor was Snowy able to suggest any cause of action justiciable in a court which a participant might have against NEMMCO for breach of the NER in the absence of bad faith or negligence, both of which are outside the immunity granted to NEMMCO by ss119(1).

24. NEMMCO also relied on the legislative history of the NEL and NER, including parliamentary statements made in relation to the enactment of ss119(1) and the provisions which preceded it. Neither the history nor the extrinsic material supports Snowy's position.

25. Finally, each party made reference to various provisions in the NEL and the NER; for example, ss55(2)(a), 71(2) and 72 of the NEL and cl.3.16(2), 8.2.1(d), 8.2.1(f), 8.2.6D(3)(d) and (e), and 8.2.9(c) and (d) of the NER. These provisions are consistent with the immunity claimed by NEMMCO. General provisions must be read subject to specific provisions (cf **Ombudsman v Laughton** (2005) NSWCA 339 at (18)-(25)) and the NER must be read subject to the NEL. The limited immunity granted to NEMMCO by ss119(1) and the provisions enabling the enforcement against NEMMCO of liabilities imposed on it by or under the NEL or NER can, and should, be read together as a coherent scheme for the creation and enforcement of statutory rights and remedies.

26. Accordingly, the DRP as presently constituted declines to answer the second question and answers "yes" to the first question, namely, "*Does s 119(1) of the National Electricity Law apply so that NEMMCO does not incur liability in relation to the Applicant's claim, set out in para. 3.3(c) of the Adviser Referral Notice dated 17 July 2006, for a determination by the Dispute Resolution Panel that the Respondent pay a monetary amount other than out of the Participant compensation fund in respect of the loss and damage alleged to have been suffered by the applicant?*"

Sir Anthony Mason
Dispute Resolution Panel Chairperson

25 September 2006