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

IN THE DISPUTE RESOLUTION PANEL AT SYDNEY

BETWEEN

Snowy Hydro Limited ACN 090 574 431

Applicant

AND

National Electricity Market Management Company Limited ACN 072 010 327

Respondent

DECISION OF THE DISPUTE RESOLUTION PANEL
(Sir Anthony Mason AC KBE, Mr G H Thorpe and Mr K Brown)

Introduction

1. The applicant (Snowy) commenced the dispute resolution process by serving a DMS referral notice (the Stage 1 Notice) on the respondent (NEMMCO) on 25 January 2006. Snowy referred the dispute to the Adviser by serving an AER Adviser referral notice (the Stage 2 Notice) on the Adviser on 17 July 2006.

2. On 1 August 2006, in a statement to the Adviser and Snowy, NEMMCO challenged the validity of Snowy's Stage 2 Notice.

3. On 11 August 2006, Snowy served a further DMS referral notice on the Adviser. By DMS referral notice dated 4 September 2006, NEMMCO alleged that the Snowy's further DMS referral notice was invalid because it was served on NEMMCO

approximately 10 months after 31 October 2005 and it did not relate to a dispute to which cl. 8.2 of the Rules apply. No argument has been presented by NEMMCO to support the challenge to the validity of Snowy's notices.

4. Snowy and NEMMCO requested a Dispute Resolution Panel (DRP) to determine two preliminary questions one of which was:

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?

The DRP (Sir Anthony Mason AC KBE, Mr G E Fitzgerald QC and Mr G H Thorpe) answered this question "Yes".

5. At a preliminary hearing held on 21 November 2006, the DRP directed that it would determine the following issues at a hearing to take place on 12 – 14 December 2006:

(a) whether NEMMCO failed to follow the central dispatch process on 31 October 2005 resulting in a scheduling error or errors;

(b) whether the DRP is limited to considering spot market losses when making an award of compensation from the Participant Compensation Fund (*Fund*): and

(c) the role, if any, of NEMMCO in the determination by the DRP of compensation payable from the Fund.

The Hearing

6. At the hearing on 12 – 14 December 2006, Mr M O'Bryan, instructed by Allens Arthur Robinson, appeared for Snowy; and Mr C Furnell, instructed by Johnson Winter & Slattery, appeared for NEMMCO.

7. The parties presented to the DRP documentary evidence and statements of witnesses. Snowy presented statements by Roger Frederick Whitby, Stephen Wallace and Nenad Tufegdzic. NEMMCO presented statements by Brian Spalding, Ken Pullen, Ian Douglas Grubb, Christopher Deague and Ian Athol Rose. The witnesses were cross-examined on their statements.

Applicable National Electricity Rules

8. It is agreed by the parties that the version of the National Electricity Rules (the Rules) which is relevant to the determination of whether a scheduling error occurred on 31 October 2005 is the version in force on that date (Version 1). This accords with cl. 33 of Schedule 2 to the National Electricity Law. Likewise, Version 1 of the Rules applies to the determination of the amount of compensation to be paid out of the Fund to Snowy if it be found that a scheduling error has occurred.

The events of 30-31 October 2005

9. Snowy contends that various scheduling errors occurred on 31 October 2006. Before identifying these alleged errors, it is convenient to state very briefly the course of

events on 30 – 31 October 2005. The account which follows is taken from the Australian Energy Regulator (AER)'s Investigation Report into the events of 31 October 2005.

10. At about 7.30am on 30 October 2005, transmission line 76 (***line 76***) was forced out of service due to an earth wire failure on a 700m. span of line crossing a deep ravine following storm activity. As a result, the fibre optic cable which was contained in line 76, and which carried the Supervisory Control and Data Acquisition (***SCADA***) data to TransGrid's western network, was also forced out of service. Delta's Mt Piper and Wallerawang power stations and TransGrid substations thereupon lost SCADA capability. This had the effect of preventing monitoring or control of high voltage equipment. It also prevented monitoring and automatic dispatch of 2300MW of generating capacity at the two power stations.

11. At about 1.30pm on 30 October 2005, TransGrid asked NEMMCO for the adjacent line, **line 77**, to be taken out of service so as to facilitate access to line 76 to repair the faulty earth wire. Together lines 76 and 77 constitute a major supply route from the western power stations into Sydney. TransGrid withdrew this request at 4.15pm as weather conditions deteriorated and indicated that it wanted line 77 taken out of service on 31 October.

12. In the evening of 30 October NEMMCO issued a notice indicating that the outage had been deferred. There were two reasons for NEMMCO's decision: first, there were insufficient options to manage post-contingent overloads and, secondly, Vales Point unit

6, which would assist in managing security, was due to come on line in the morning of 31 October but there was uncertainty about the time when it would come on line.

13. At that time NEMMCO staff were aware that **line 5** was subject to a planned outage on the morning of 31 October 2005.

14. Line 5 was taken out of service at 5.05am on 31 October 2005.

15. During the morning of 31 October 2005 (between about7:00am and 8:30am), NEMMCO staff considered the effect on the power system of the proposed combined outage.

16. At 8.25am on 31 October 2005, NEMMCO was advised that Vales Point Unit 6 would not be returned to service until about 11.00am that day.

17. At about 8.50am on 31 October 2005, TransGrid again requested NEMMCO to permit line 77 to be taken out of service to enable repairs to be effected to line 76 on the basis that the loss of SCADA was an emergency and that the line 77 outage needed to go ahead urgently. At about 9.07am on 31 October NEMMCO approved the combined outage of lines 76 and 77. TransGrid had earlier advised NEMMCO that the recall time of line 77 was 30 minutes.

18. At 9.20am NEMMCO invoked network constraint sets to manage the combined outage of lines 76 and 77 and at 9.25am, line 77 was switched out of service (the morning outage). The outage gave rise to system security issues. From the dispatch intervals ending 9.20am onwards a number of constraints bound and others violated. At about 9.30am, large power system swings were observed with the Queensland-NSW interconnector. The spot price had reached the value of lost load (VoLL) by this stage.

19. At about 9.52am, NEMMCO determined that the power system security problems should be resolved by recalling line 77. Before recalling line 77, NEMMCO revoked several violating constraint equations because they were not operating effectively and because line 77 was to be recalled. At approximately 9.57am, NEMMCO notified TransGrid of the recall, prior to the necessary work being completed on line 76 by TransGrid. Line 77 was reinstated at 10:53am on 31 October 2005.

20. Following the reinstatement of line 77, NEMMCO staff again studied the effect on the power system of the proposed combined outage in order to devise a plan to manage the system security issues associated with the outage. At this time, NEMMCO revised constraints that had been invoked during the morning outage.

21. At approximately 11.58am on 31 October 2005, TransGrid again asked NEMMCO for line 77 to be taken out of service to enable repairs to be effected to line 76. NEMMCO granted approval to proceed at 1.35pm and constraint equations associated with the outage were invoked.

22. During this outage (the afternoon outage) a number of network constraints in NSW and Queensland bound and five violated. The 5-minute dispatch price in NSW increased from $33/MWh at 1.55pm to $10,000/MWh at 2.00pm. The price remained above $6,000/MWh for a number of dispatch intervals until around 3.00pm when it fell to around $320/MWh. The price in Queensland was also close to the price cap for three intervals from 2.00pm.

23. Line 77 was brought back into service at 4.23pm.

24. The effect of the constraints imposed by NEMMCO during the morning and afternoon outages of lines 76 and 77 was to constrain flow on the Snowy-New South Wales interconnector into New South Wales.

The scheduling errors of which Snowy complains

25. Snowy identifies a number of scheduling errors as the basis of its claim against the Fund. These errors are, in the order in which they were stated by Snowy's counsel in his opening submission, as follows:

(1) NEMMCO's decision to proceed with the combined outage of lines 76 and 77 on 31 October was unreasonable.

(2) NEMMCO failed to implement in various respects the management plan which it devised to manage the system in the light of the combined outage of the two lines.

(3) NEMMCO failed to:

(a) determine appropriate constraints for the outages of lines 5, 76 and 77

(b) assess properly the effect of the constraints in the maintenance of power system security; and

(c) represent properly the constraints or otherwise take them into account

in the central dispatch process in accordance with the Rules. The constraints said to be the subject of this scheduling error or errors were constraint equations NIL 28, NIL IN, 76 + 77E, 77_17, WWIG. Snowy alleges that instead of revoking equations 76 + 77E and 77_17 in the morning of 31 October, NEMMCO should have requested sufficient ramp rate capability or reduction of output from Mt Piper and Wallerawang generators. Two elements in this complaint about constraints are that constraint equation 76 + 77E was inappropriately oriented and that incorrect coefficients were ascertained for the Shoalhaven pumps.

(4) NEMMCO failed to use 15 minutes ratings for lines 81 and 82.

(5) NEMMCO failed to hand/dress the Mr Piper and Wallerawang power stations with the result that NEMMCO failed to carry out the central dispatch process in accordance with the Rules.

(6) NEMMCO failed to direct the Mt Piper and Wallerawang generators to comply with their dispatch targets.

(7) NEMMCO failed to override the reduced ramp rates bid by Mt Piper and Wallerawang power stations.

(8) NEMMCO failed to maintain power system security.

The effect of the alleged scheduling errors

26. Snowy claims that, by reason of the scheduling errors identified above, the power system ceased to be secure and the spot market price of electricity in NSW was much higher than it ought to have been for a number of dispatch intervals, and in a number of intervals reached its maximum level.

27. Snowy also claims that, in consequence of the scheduling errors,

(a) flows on the Snowy-NSW interconnector were constrained down, thereby constraining the quantity of Snowy generation able to be dispatched across that interconnector into NSW;

(b) the Snowy Regional Reference Price decreased;

(c) the NSW Regional Reference Price increased; and

(d) Snowy suffered substantial losses in relation to its hedging, spot market and Settlement Residue Auction (***SRA***) revenues.

The National Electricity Market (NEM) and the Rules relating to the operation of the market by NEMMCO

28. Section 7 of the National Electricity (South Australia) Act 1996, provides that the objective of the NEM is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity, and the reliability, safety and security of the national electricity system. At least in part, this objective is achieved

by the creation of a compulsory wholesale market within the NEM in which generators compete to supply electricity.

29. The wholesale market is operated and managed by NEMMCO[1]. NEMMCO is required to operate the market in accordance with the requirements of Chapter 3 of the Rules. Clause 3.8.1(a) of the Rules provides that NEMMCO must operate a central dispatch process to dispatch scheduled generating units, scheduled loads, scheduled network services and market ancillary services in order to balance power system supply and demand, "using its reasonable endeavours to maintain power system security in accordance with Chapter 4 and to maximise the value of spot market trading on the basis of dispatch offers and dispatch bids". In argument, Snowy's counsel acknowledged that the obligation to use "reasonable endeavours" seems to apply both to the maintenance of power system security and to maximising the value of spot market trading.

30. Consistently with that obligation, cl. 3.8.1(b) of the Rules provides that the central dispatch process operated by NEMMCO shall "aim to maximise the value of spot market trading" subject to, amongst other things:

(a) dispatch bids;

(b) constraints due to availability and commitment;

(c) power system security requirements determined as described in chapter 4;

(d) intra-regional network constraints;

(e) inter-regional constraints; and

(f) current levels of dispatched generation, loan and market network services.

[1] Cl.3.2.1(a) of the Rules

31. Clause 3.8.24 of the Rules provides that a scheduling error will be deemed to have occurred if either:

(a) the DRP determines under cl. 8.2 that NEMMCO has failed to follow the central dispatch process; or

(b) NEMMCO declares that it has made a scheduling error.

32. Chapter 10 of the Rules defines "scheduling error" as "a failure by NEMMCO to follow the central dispatch process in accordance with Chapter 3". "Central dispatch" is defined as "the process managed by NEMMCO for the dispatch of scheduled generating units, scheduled loads, scheduled network services and market ancillary services in accordance with clause 3.8.

33. Two points emerge from cl. 3.8.24(a) and the definition of "scheduling error". First, a scheduling error is simply a failure to follow the central dispatch process in accordance with Chapter 3. Subject to the obligation to use reasonable endeavours to maintain power system security, there is no express requirement that there should be an unreasonable act or omission on NEMMCO's part in order to constitute a scheduling error. Many of the elements of central dispatch are activities undertaken by NEMMCO but it is also reliant on other inputs and systems, for example communication facilities. Accordingly, NEMMCO may fail to follow the central dispatch because it is unable to because of factors beyond its control.

34. The alternative literal interpretation, proposed, by NEMMCO would limit scheduling errors to instances where the central dispatch process was not followed because of actions or omissions by NEMMCO. A significant consequence of a finding that a scheduling error has occurred is to open up the possibility of compensation to adversely affected participants from the Fund. The alternative interpretation would therefore mean that an adversely affected participant would have no means to access the Fund if the central dispatch process was not followed if the reason was other than a fault of NEMMCO, but would have, subject to the determination of a DRP, if the scheduling error was due to NEMMCO act or omission. The Panel considers the former view is the better one.

35. Second, an essential element in the concept of "scheduling error" is that it is not an outcome failure but is a failure relating to inputs or to processing of those inputs. A scheduling error is not a failure to achieve an optimal outcome. Aspects of the central dispatch process were agreed to contain approximations and if for no other reason the outcome therefore cannot in general be optimal. It follows that the standard that should be applied is whether the inputs and processing that occurred were within a reasonable tolerance of what is possible with good industry practice.

36. Chapter 4 confirms that a scheduling error is not a failure to achieve an optimal outcome. Although Chapter 4 is largely concerned with power system security, the Chapter has other aims as well. Clause 4.1.1(a) states the aims of the Chapter:

"(i) to detail the principles and guidelines for achieving and maintaining power system security;

(ii) to establish the processes for the assessment of power system reserves;

(iii) to establish processes to enable NEMMCO to plan and conduct operations within the power system to achieve and maintain power system security; and

(iv) to establish processes for the actual dispatch of scheduled network services and ancillary services by NEMMCO."

37. Clause 4.9 governs the giving by NEMMCO of dispatch instructions in respect of scheduled generating units, scheduled loads, scheduled network services and market ancillary services. The provisions of this clause impose obligations in NEMMCO with respect to load forecasting (cl. 4.9.1), dispatch instructions to scheduled generators (cl. 4.9.2), scheduled network providers (cl. 4.9.2A), instructions to registered participants (cl. 4.9.3), ancillary service instructions (cl. 4.9.3A) and other matters involved in the central dispatch process. Errors by NEMMCO in managing these aspects of the central dispatch can constitute scheduling errors.

38. Clause 3.16.2(c) and (c1) indicate what constitutes a scheduling error in the context of instructions given by NEMMCO to a scheduled generator and a scheduled network service provider. Paragraph (c) refers to an instruction to a generator in respect of a generating unit to operate at a lower level than that at which it would have been instructed to operate had the scheduling error not occurred. Paragraph (c1) makes similar provision in relation to an instruction to a network service provider relating to its

network service to transfer less power than it would have been instructed to transfer had the scheduling error not occurred.

39. So understood, the concept of scheduling error does not embrace errors, whether unreasonable or not, which stand outside the central dispatch process. Snowy argues nonetheless that this process is inter-related with NEMMCO's power system security responsibilities and is so treated by Chapters 3 and 4. The next step in the argument is to say that by reason of that inter-relationship and because an outage affects the dispatch process, an outage must be considered part of that process.

40. Granted the existence of the inter-relationship and the impact of an outage on the process, NEMMCO's approval of a transmission line outage to enable repair of another line which is out of service cannot constitute a scheduling error because the approval is not an element in the central dispatch process of dispatching units, loads and other services. This conclusion is fatal to Snowy's claim that the approval of the outage of line 77 was a scheduling error. The approval may have led to a scheduling error as a result of NEMMCO's actions or inactions following approval, but the act of approval was not such an error.

41. The second point to emerge from cl. 3.8.24(2) and the definition is that a scheduling error is a failure by NEMMCO to follow the central dispatch process. Once such a failure is established, it is immaterial that the reason for the failure is the act or omission of another party, say a generator. In the context of a scheduling error, the Rules

are concerned only with a failure by NEMMCO to follow the dispatch process, whatever the reason for that failure may be, subject to questions affecting power system security, a matter to be considered later. It follows that NEMMCO's claim that a scheduling error must involve some "fault" on the part of NEMMCO must be rejected.

The central dispatch process and power system security

42. Chapter 3 of the Regulations deals with "Market Rules", including the market functions and spot market functions of NEMMCO (cls. 3.2.1 and 3.2.2) as well as NEMMCO's management of the operation of the power system (cl. 3.2.3). Clause 3.2.3(a) provides :

> "Subject to Chapter 4, NEMMCO must manage the day to day operation of the power system, using its reasonable endeavours to maintain power system security in accordance with this Chapter."

Clause 3.2.3(a), in its reference to using "reasonable endeavours to maintain power system security", reflects the relevant provisions of Chapter 4 dealing with "Power System Security".

43. Chapter 4 imposes on NEMMCO a general "responsibility to maintain power system security" (cls.4.1.1(b), 4.3.1(a)) and "to ensure the power system is, and is maintained, in a satisfactory operating state". (cl. 4.3.1 (k)(1)). Clause 4.3.2 provides that with respect to "system security":

> (a) NEMMCO must use its reasonable endeavours, as permitted under the Rules,……to achieve the NEMMCO power system security

responsibilities in accordance with the power system security principles described in clause 4.2.6.

(b) Where an obligation is imposed on NEMMCO under this Chapter to arrange or control any act, matter or thing or to ensure that any other person undertakes or refrains from any act, that obligation is limited to a requirement for NEMMCO to use reasonable endeavours as permitted under the Rules, including to give such directions as are within its powers, to comply with that obligation.

(c) If NEMMCO fails to arrange or control any act, matter or thing or the acts of any other person notwithstanding the use of NEMMCO's reasonable endeavours, NEMMCO will not be taken to have breached that obligation".

44. The power system security principles set out in cl. 4.2.6 include the principle that:

"(a) to the extent practicable, the power system should be operated such that it is and will remain in a secure operating state".

45. The effect of cl. 4.3.2(a) is that NEMMCO's obligation to achieve its power system security responsibilities is limited to using "its reasonable endeavours", a limitation which is reinforced by cl. 4.3.2(b). Clause 4.3.2(c) then makes it clear that, so long as NEMMCO use its reasonable endeavours, a failure by NEMMCO to arrange or control any act, matter or thing or the acts of any other person will not amount to a breach of such an obligation. In this way, the standard of "using its reasonable endeavours" governs NEMMCO's responsibilities to achieve power system security.

46. It is this standard which applies to Snowy's claim that NEMMCO should not have approved the outage of line 77. In approving the outage of line 77, NEMMCO was endeavouring to achieve power system security by enabling the repair of line 76. Consequently cl. 4.3.2 applies. In many cases, as here, questions of power system security involve fine questions of balancing immediate system security against longer term threats to security. In acting as it did NEMMCO was "using its reasonable endeavours" to achieve power system security.

47. There is another question and that is whether cl. 4.3.2 is not merely an answer to a suggested breach of NEMMCO's obligations to achieve power system security, but also an answer to a suggested scheduling error when that error comes about in the course of, or by reason of, reasonable endeavours by NEMMCO to achieve power system security. The Rules do not provide a clear answer to this question. But both Chapters 3 and 4 address NEMMCO's management of the central dispatch process and its responsibilities to achieve power system security on the footing that they are inter-related matters and that management of the dispatch process is dependent upon NEMMCO using its reasonable endeavours to achieve power system security. As we have seen, cl. 3.8.1(a), which imposes the obligation on NEMMCO to operate the central dispatch process, also requires NEMMCO to use reasonable endeavours to maintain power system security. It is fair to say that the Rules treat the maintenance of power system security as the paramount consideration.

48. Discharge by NEMMCO of its paramount duty to achieve or maintain power system security may lead NEMMCO into action which would otherwise constitute a scheduling error. In this respect there is an apparent incongruity. On the one hand, where a scheduling error occurs in the absence of any risk to power system security, market participants who suffer loss may recover compensation from the Fund. On the other hand, no compensation is recoverable from the Fund by such participants where what otherwise would be a scheduling error occurs as a result of NEMMCO discharging its obligations relating to power system security.

49. However, cl. 3.2.3a, in requiring NEMMCO to manage the operation of the power system, makes that requirement subject to Chapter 4 and emphasises NEMMCO's obligation to use reasonable endeavours to main power system security. And cl. 4.3.2 (c) seems to apply to all obligations arising under Chapter 4, whether they relate to power system security or the dispatch process.

50. So cl. 4.3.2 can provide an answer to a claim of scheduling error, at least in those cases where this error arises in the course, or by reason, of reasonable endeavours by NEMMCO to achieve power system security.

Were the matters complained of by Snowy "scheduling errors"?

51. Before we proceed to consider these matters individually, it is necessary to make some preliminary comments about the state of the evidence, particularly the evidence presented and not presented by NEMMCO. NEMMCO did not attempt to lead evidence

from any of the persons it employed to manage and operate the power system on 30-31 October. We did not hear from Mr Little who was advised by TransGrid that it wished to take line 77 out of service for 4 hours with a recall time of 30 minutes, though we did hear from Dr Spalding of NEMMCO who discussed the outage with Mr Murray of TransGrid on 31 October. Nor did we hear from Mr Phillip Smith who was informed by TransGrid on 30 October and early on 31 October that it was not necessary to restore line 76 to service, Mr Byfield who identified key problems (including overloading of lines 81, 82, 8 and 16), Mr Herden who was the primary operational decision-maker in relation to management of the outage and Mr Combridge who took over from Mr Byfield and likewise was concerned about the problems of managing the power system if the proposed outage took place. Nor did NEMMCO call its constraint builders Mr Blake, Mr Miller and Mr Luschnicoff or Ms Mathur who was at the dispatch desk on 31 October. NEMMCO offered no explanation for not presenting these officers as witnesses.

52. NEMMCO presented three senior employees, Dr Spalding, Mr Pullen and Mr Deague, who gave evidence to the effect that NEMMCO acted reasonably in approving the outage. Mr Pullen's evidence was largely based on the complete transcript records of events and conversations on 30-31 October and to a lesser extent on conversations with those operating power system on those days. Mr Deague's evidence was based on conversations with those persons, while Dr Spalding had not familiarised himself with the transcript though he had been briefed by operational staff, particularly about the outage, before he spoke to Mr Murray of TransGrid on 31 October.

53. NEMMCO presented two independent experts, Dr Rose who did not speak to the operational staff and Mr Grubb who also did not speak to the operational staff and relied on findings in a report prepared by NEMMCO and on excerpts from the transcripts prepared by NEMMCO.

54. That said, the complete transcripts which are in evidence, provide a comprehensive and accurate record of the events which occurred on 30-31 October, of the relevant actions and inactions of NEMMCO operational staff and of the contemporaneous conversations which took place. We are therefore justified, as Snowy argues, in accepting the transcript record as a reliable account of the course of events. Indeed, we do not think that there is room for much debate about what actually happened or about the reasons for the decisions which were taken by NEMMCO staff though there is an absence of detailed evidence as to the studies which operational staff made of power flows on 31 October and as to the reasoning which led to decisions made on that day. We approach the evidence of the witnesses, including the experts, for both parties on this basis. At the same time we infer that the evidence of NEMMCO's operational staff could not assist its case that the relevant decisions taken were reasonable in the circumstances.

(1) NEMMCO's decision to proceed with the combined outage of lines 76 and 77 on 31 October 2005

55. For the reasons stated in paras 39 and 40 above and preceding paragraphs, the decision was not an element in the central dispatch process. Consequently the decision was not a scheduling error.

56. Further, even if the decision was capable of constituting a scheduling error, it was a decision made to achieve or maintain power system security. The consequence is, as Snowy's counsel acknowledges, that NEMMCO was under an obligation to use its reasonable endeavours to achieve that objective. As pointed out earlier, NEMMCO was not in breach of its power system security obligations if it used its reasonable endeavours to achieve that end.

57. Snowy contends that NEMMCO acted unreasonably in approving the combined outage of lines 76 and 77, with line 5 also out of service. To be clear NEMMCO does not explicitly approve outages of transmission elements, it has an effective power of veto of proposals by Transmission Network Providers (TNSPs) to remove an element of transmission network from service, such as TransGrid's proposed outage of line 77. This is under cll. 4.3.4(g), 4.6.4, 4.6.5 and 4.8.9. A decision of NEMMCO to not prevent an outage of a TSNP is, however, commonly referred to as approval, but is different from the position of an operator in a request/approve environment. NEMMCO is thus only able to prevent an outage of a transmission line on security or reliability of grounds. For convenience we will retain the use of the common term "approval" in this determination but note that its correct interpretation is as we have explained. In its submission, Snowy relies heavily on the unwillingness of NEMMCO's operational staff on the evening of 30 October and the early morning of 31 October to approve the outage. That unwillingness was based on apprehensions that there were insufficient options to manage post-contingent overloads, creating a problem with power system security. These difficulties

would be much reduced when the Vales Point unit came on line but it was uncertain when that would occur.

58. Snowy argues that, in the circumstances that existed, and on the facts known to NEMMCO, NEMMCO should have declined to approve the combined outage until either:

(a) The Vales Point unit had returned to service; or

(b) NEMMCO had devised a set of constraints that represented the physical characteristics of the network and would properly manage system security and was confident that there was adequate available generation to meet forecast demand.

59. The factor which induced NEMMCO, despite its earlier unwillingness, to agree to the combined outage was TransGrid's declaration early on 31 October that the situation represented an emergency condition. The decision to approve was made evidently by the shift manager but it was discussed by Mr Murray, the chief executive of TransGrid and Dr Spalding who had been briefed by his operational staff at NEMMCO. From this briefing Dr Spalding understood that, from the studies made by staff of the outage, they could "manage that within our obligations" but that it would be "tight".

60. TransGrid's concern leading it to declare an emergency was that there was a lack of SCADA from a number of major power stations and substations in NSW, there were communication issues and degraded protection because inter-trips were out of service

leading to compromise of the integrity of the protection on the transmission network, this being a serious issue. According to Mr Pullen of NEMMCO the outage of the protection facilities carried by line 76 in the circumstances was a very serious matter which, according to good industry practice, required restoration. Absent full restoration, there was a risk to property and equipment and a risk to power system security in the circumstances of the day.

61. In the light of TransGrid's declaration, NEMMCO agreed to the outage but it did so on the basis that it could recall line 77 in 30 minutes and that it, NEMMCO, had an acceptable plan to manage further critical failures in what were difficult circumstances. It understood also that the Vales Point unit may come back on line and reduce its concerns about system security, though the time was uncertain and, according to the evidence of Mr Pullen, NEMMCO based its assessment on the assumption the unit would not return to service during the outage. As it happened, NEMMCO recalled line 77 when power system security problems arose during the morning outage. Those problems included oscillations on major flows elsewhere in the network, something that does not appear to have been contemplated when the outage was approved.

62. In deciding whether to approve the outage or not, NEMMCO was faced with a balancing decision. On the one hand, there was the risk that, if the outage was approved, problems could arise in managing the power system having consequences for the dispatch process and for power system security, with the recall of line 77 standing as a safety net.

On the other hand, the declaration of emergency having been made, a refusal to approve the combined outage might lead to much greater potential risks to power system security.

63. In this situation and in the circumstances which prevailed at the time (which are the relevant circumstances) we consider it would take compelling evidence that NEMMCO, as the body explicitly charged with making such decisions, acted unreasonably in deciding which of two less than desirable paths to take. We do not regard the evidence relied upon to establish that NEMMCO acted unreasonably as compelling. Indeed on the evidence, we consider that NEMMCO's decision to approve, or rather not veto, the outage was reasonable and that the steps that it took in this respect constituted reasonable endeavours to maintain power system security pursuant to cls. 3.8.1(a) and 4.3.2(a).

(2) NEMMCO's alleged failure to implement in various respects the management plan which it devised to manage the system in the light of the combined outage of the two lines

64. Nothing in the rules for the central dispatch process requires that NEMMCO have a management plan per se, or that having created such a plan, NEMMCO must implement it. Snowy has not claimed there is such a requirement. But by inference Snowy claims that by having created such a plan and by not following it NEMMCO did not act reasonably. This position is consistent with Snowy's acceptance that reasonableness is a criterion in deciding if an action to maintain system security can be a scheduling error.

65. Beyond the stark absence of a requirement to have a management plan, we are not persuaded that the mere failure to follow such a plan developed at a certain point in time can be a failure to act reasonably, especially if circumstances change. What could be a scheduling error, however, is a failure to act reasonably in the circumstances that actually prevailed regardless of whether there was a plan, but this is a separate question and is independent of whether a management plan existed or was followed.

66. We therefore find that failure to follow a particular plan to manage system security cannot be a scheduling error. We return to the claim that NEMMCO failed to maintain system security in consideration of the last of the list of alleged scheduling errors below.

(3) NEMMCO failed to:

(a) determine appropriate constraints for the outages of lines 5, 76 and 77;

(b) assess properly the effect of the constraints in the maintenance of power system security;

(c) represent properly the constraints or otherwise take them into account in the central dispatch process in accordance with the Rules. The constraints said to be the subject of this scheduling error or errors were constraint equations NIL 28, NIL IN, 76 + 77E, 77_17, WWIG. Snowy alleges that instead of revoking equations 76 and 77E and 77_17 in the morning of 31 October, NEMMCO should have requested sufficient ramp rate capability or reduction of output from Mt Piper and Wallerawang generators. Two elements in this complaint about constraints are that constraint equation 76 and 77E was inappropriately oriented and that incorrect coefficients were ascertained for the Shoalhaven pumps.

67. There are a number of elements to this allegation. The first is whether the different constraint equations that were used during the morning outage and the afternoon outage provided adequate representations of the network. This is an implied requirement of cl. 3.8.10 of the Rules. Snowy claimed that in neither case were the equations a good representation and *ipso facto* scheduling errors occurred. NEMMCO acknowledges that with the benefit of hindsight the equations were not a good representation. This is self evident from the serious effect the constraints used in the morning had on system security and led to the recall of line 77.

68. NEMMCO nevertheless claims that use of the equations did not constitute scheduling errors because it used reasonable endeavours and employed good industry practice in meeting its obligations for system security in the circumstances. In particular, NEMMCO contends that in the absence of a complete set of revised equations for the outage conditions (which changed throughout the duration of the outage of lines 76 and 77) it was good industry practice to retain the system normal constraints in NEMDE and overlay specific equations to cater for the outage of lines 76 and 77. NEMMCO adduced evidence from its officers to strongly claim that they would regard removal of the system normal constraint set without full testing of the outage set as unacceptable and a risk to system security. Dr Rose gave confirming evidence in this regard.

69. Mr Wallace for Snowy gave evidence that he had been able to develop the first version of a replacement equation in three hours suggesting that NEMMCO should have been able to use constraints that reflected the actual outages. However, he acknowledged

this was for only one equation within what would have had to be a set of equations and that he had also employed a "quick constraint" on Delta units (Mt Piper and Wallerawang) to effect a reduction in their output rather than through a standard constraint set. In cross examination Mr Wallace felt that his expertise did not enable him to venture a view on whether it would have been a responsible action for NEMMCO to have removed the system normal constraint set or use an equation of the form he had produced under the circumstances facing NEMMCO.

70. NEMMCO noted that in other circumstances where it had sufficient time to prepare, it had on a limited number of occasions removed the system normal set from service and used a replacement set, but that there had not been sufficient time for it to develop a replacement set on this occasion.

71. Contrary to Snowy's claim that NEMMCO had in the order of 19 hours to prepare for the outage of lines 76 and 77 the transcripts demonstrate NEMMCO had only a matter of hours. TransGrid first requested the outage as a normal status (that is not as an emergency outage) early on the Sunday afternoon. NEMMCO assessed the outage and advised TransGrid and later the market that the outage could not proceed, that is, it would in those circumstances veto it if TransGrid were to proceed. It was not until the morning of 31 October at approximately 8:50am that TransGrid declared the outage to be urgent and NEMMCO examined how it could accommodate it, albeit with some difficulty. The evidence does not give the earliest time that NEMMCO may have been able to

commence derivation of a replacement constraint set, but it seems apparent that it was at most only a couple of hours on the Monday morning.

72. On the basis that NEMMCO had decided that it would not object to the outage as an emergency situation we are not persuaded that NEMMCO had any alternative but to proceed as it did.

73. Snowy has claimed that the evidence shows that NEMMCO's operational staff were not satisfied that security could be maintained and forecast the problems that occurred during the morning outage and led to recall of the line. But the evidence does not say what problems were expected. It does not follow that NEMMCO would have allowed the outage to proceed expecting the particular problems that occurred, in particular the oscillations associated with interconnectors which have been noted as serious matters, only to recall the line when they did occur. If NEMMCO experienced only the problems it had been expecting then it would have been logical to continue. It seems clear that NEMMCO did not anticipate the effect the constraints it was using would have on market outcomes, but was acting reasonably and in good faith in accordance with its obligations relating to system security. For similar reasons to those presented at paras 49 and 50 it therefore was not a scheduling error under the rules to have used the constraint equations in the circumstances.

74. We make this finding on the basis of the drafting of the rules but note that this is a somewhat incongruous outcome from a market perspective. Snowy's argument would

have been much stronger had the outage been able to be deferred, as NEMMCO had initially decided, so that NEMMCO could have prepared properly, but if it nevertheless utilised the same constraint equations. The Panel has not formally considered if such a situation would then have been a scheduling error, but if a DRP were to find this to be the case then Snowy would have had a claim on the compensation fund in circumstances where it does not now, because NEMMCO used its reasonable endeavours to achieve power system security and acted in the interests of security. That is, Snowy's commercial position is dependent on the status of the outage as a security matter.

75. We note in passing that even the later changes to the Rules in cl. 3.8.24 (a)(3) effective from January 2006, and which introduced the concept of a scheduling error being the result of a manifest input error not necessarily the fault of NEMMCO, would be unlikely to resolve this situation satisfactorily. Under the later amendment a manifest input error, including due to errors in constraint equations, can be declared a scheduling error and the latest correct prices substituted for incorrect prices, but only if detected and corrected within 30 minutes. This form of scheduling error is clearly not related to an unreasonable or erroneous act of NEMMCO, and in fact may not be due to any act by NEMMCO. In the circumstances of 31 October the NEMMCO control room was operating under some stress with a known "tight" security situation compounded by unexpected outcomes, and it would have been an extra burden to manage the declaration of manifest error. Further, once it was understood the constraint equations were manifestly in error, NEMMCO would have needed to consciously continue to use such equations to allow the outage of line 77 to continue. Although this would be possible it

would seem to be a less than desirable position for NEMMCO and the market. We draw this situation to the attention of the relevant authorities for their consideration.

(4) NEMMO failed take into account in a timely manner the 15 minute ratings provided by TransGrid <u>for lines 81 and 82.</u>

76. In respect of Snowy's claim that NEMMCO failed to include the 15 minute ratings for lines 81 and 82 in NEMDE until 11:00am on 31 October, NEMMCO has conceded that was an oversight (Pullen para. 60). Accordingly NEMMCO failed to take into account relevant constraints on the network in the central dispatch process in accordance with cl. 3.8.1. The responsible officer was at the centre of managing the effects of the outages on security and had in fact accounted for the 15 minute ratings in his monitoring of security but did not ensure these were reflected in the NEMDE and therefore in the central dispatch process. It is important to note that NEMMCO's control centre staff were focussed on managing system security at the time but nevertheless NEMMCO's processes allowed an inconsistency to exist between the market systems and security systems contrary to the implicit requirement under the market design principles of cl. 3.1.4 (4). This is because loading on critical lines was being vetted against Contingency Assessment analysis using the 15 minute ratings but these ratings were not known to the NEMDE. The failure to ensure the rating of lines 81 and 82 were adequately reflected in central dispatch therefore was not an action taken in order to manage system security. It was a product of the overall processes employed by NEMMCO that in the circumstances led to a scheduling error.

77. Accordingly we find there was scheduling error due to the failure to properly reflect 15 minute line ratings for lines 81 and 82.

(5) NEMMCO failed to hand/dress the Mt Piper and Wallerawang power stations with the result that NEMMCO failed to carry out the central dispatch process in accordance with the Rules.

78. Snowy alleged and NEMMCO concurred that NEMMCO was bound by its procedures in relation to hand dressing in the event of failure of metering to provide the necessary data to allow NEMDE to function correctly. Much was made in evidence about the alleged failure of NEMMCO to hand dress all relevant generation data. NEMMCO has emphasised that is obligation under the procedure to which it has agreed it is bound is to *try*.

79. We have taken the word *try* to mean something less than reasonable endeavours but more than just a token effort . It is common ground that the hand dressing did not perfectly reflect the actual output of the stations at all times. That fact is reported in the AER report at section 3.2. But did NEMMCO try? Did they employ more than a token effort? And was the less than perfect result the product of actions to manage system security?

80. Before reviewing NEMMCO's performance it is worth noting that there were three phases of data substitution on 31 October. Prior to 7:25am NEMMCO was allowing the automatic process that carried forward the last dispatch target. From 7:25am

NEMMCO began to hand dress to the best known information about actual output. From 10:40am NEMMCO reverted to use of the target from the last dispatch but had emphasised the importance of following targets with each of the relevant stations.

81. It appears to us that there is some confusion created as a result of the different perspectives taken by the parties in examining the evidence in relation to this aspect.

82. The first is the AER report which focussed on what would have been needed in order to achieve optimal dispatch. Its report notes the consequences of discrepancies between actual output and hand dressed levels and the effect of these discrepancies on dispatch. Snowy has made similar comparisons.

83. The second is that NEMMCO has defended its performance in relation to hand dressing by reference to whether the hand dressing between 7:25am and 10:40am aligned with the evidence of what it understood to be the outputs of the stations and its efforts to ascertain this information.

84. In the absence of evidence from the staff directly involved we have reviewed the detailed transcripts of control room activity and quantitative evidence provided by NEMMCO, Snowy and the AER. It does appear to us that relevant staff, and in particular Ms Mathur, who was on the dispatch desk during the outages on 31 October, were aware of the need to obtain appropriate readings and hand dress the data. Our review of the transcript indicates that in the crucial period between 7:25am and 10:40am

on 31 October Ms Mathur attempted on a number of occasions to ascertain actual outputs and to hand dress to output, until NEMMCO's senior operational manager, Mr Herden, instructed her at approximately 10:40am that hand dressing be based on target rather than actual outputs because of the discrepancies that were emerging.

85. In the light of the initial metering failure and loss of communication facilities the task of obtaining up to date information about actual output was very difficult. In the circumstances we are of the view NEMMCO did *try* and thus met its obligations under the procedure.

86. Nevertheless it can be said that, prima facie, the central dispatch process was not followed as the requirement of cl. 3.8.1 (b)(8) that current data about generation levels be taken into account was not satisfied. The AER report Pages 26 and 27 shows that the difference between actual output and the hand dressed values of up to 90MW were occurring in the period. The transcripts of communication between the NEMMCO and Delta control room staff indicate a level of confusion in the first part of the morning outage but improvements as time passed. After the decision to hand dress to target and communication improved differences between actual and hand dressed values fell to around 5 – 10 MW's. The Panel is therefore of the view that the differences that occurred prior to 10:40am were in excess of what would have been possible and thus NEMMCO failed to follow the dispatch process. We emphasise again that in this instance it was not because of an unreasonable act or omission of NEMMCO but was a consequence of the circumstances.

87. The difference in approach from the parties provides a stark example of the question of whether a scheduling error requires that there be an omission or unreasonable act on NEMMCO's part or simply a failure to follow the central dispatch process of cl. 3.8.1 of the Rules. As discussed at para 33 we have concluded that there does not need to be fault on the part of NEMMCO, simply that in the management of central dispatch there was a failure to follow the central dispatch process, subject to the limitation that NEMMCO is only required to exercise reasonable endeavours in relation to those elements related to system security.

88. We therefore conclude that, notwithstanding NEMMCO's compliance with its own procedures and that it acted reasonably in the circumstances, in accordance with our earlier conclusion stated at para 33 above, the failure to adequately hand dress was a scheduling error.

89. Before leaving this topic we note three matters. The first is that this finding is in principle consistent with the subsequent amendment to the Rules in cl. 3.8.24 (c) noted at para 75. The second is that the Panel is also aware that the failure of SCADA and of the telephone connections was not the result of anything under NEMMCO's control. This point is discussed in the AER's report in some detail. The third is that the Panel recognises that this finding suggests in principle that failure to accurately reflect correct metering values in dispatch in the event normal metering is not functioning correctly may be a scheduling error.

90. However, a scheduling error exists only if NEMMCO accepts an error has occurred or NEMMCO and a party are in dispute about whether an error has occurred and the matter is referred to DRP which decides that a scheduling error has occurred. In addition, since January 2006 a scheduling error can occur due to a manifest error of input providing the error is identified within 30 minutes. Except for a manifest input error detected within 30 minutes, therefore a party must initiate a dispute in order to obtain a determination that a scheduling error occurred. It must therefore expect that the compensation that might be awarded from the Fund will be sufficient to justify this course of action. It follows therefore that only material discrepancies will emerge as potential claims, or as is the case here, be attached to a wider claim. The alternative to accept discrepancies no matter how large is inequitable. A further alternative to define tolerances is a matter for the relevant bodies to consider if necessary.

(6) NEMMCO failed to direct the Mt Piper and Wallerawang generators to comply with their dispatch targets.

91. It became apparent from both Mr Whitby's and Mr Deague's evidence during the hearings that on the basis of an amended comparison between actual outputs and dispatch targets that neither station was deviating from its targets to the point where they were regarded formally as non-conforming according to NEMMCO's procedures. Hence both stations can be said to have been following targets and there was in fact no basis for a direction to force them to comply. Accordingly, there was no scheduling error in this respect.

(7) NEMMCO failed to override the reduced ramp rates bid by Mt Piper and Wallerawang power stations.

92. Snowy has alleged that NEMMCO should have overridden the reduced ramp rate bid by Delta for these stations on the basis that it had previously identified output of these stations as a critical element. Mr Pullen gave evidence to the effect that ramp rate rebids did not precipitate a lack of security of operation in that the power system was already operating in an insecure state at the times the ramp rates were lowered. From this we infer that even if NEMMCO had sought to have Delta offer a greater ramp rate this would not have brought the power system back to a secure operating state.

93. We accept that evidence and find that there was no scheduling error as a result of inaction to override ramp rates.

(8) NEMMCO failed to maintain power system security.

94. It is common ground that the power system was not secure for a period of time during the morning of 31 October. For reasons outlined above NEMMCO's obligations to maintain security are not a part of the central dispatch process and any failure to maintain a secure operating state cannot therefore be a scheduling error under the Rules. To paraphrase our earlier conclusion in this regard, the consequences for dispatch of scheduled units on the basis of whatever action NEMMCO takes (or does not take) to manage system security are key elements of the central dispatch process but whether or not it takes such actions are not.

95. A failure to maintain system security cannot therefore be a scheduling error of itself.

96. We therefore answer question (a) in para. 5 above:

"yes there were scheduling errors due to

(1) the failure to properly reflect 15 minute line ratings for lines 81 and 82; and

(2) the failure to properly hand dress the Mt Piper and Wallerawang power stations."

Limitation on Losses - Clause 3.16.2

97. NEMMCO's case on this point is that cl. 3.16.2 limits compensation recoverable from the Fund to compensation for spot market trading losses. Alternatively, NEMMCO argues that, in the exercise of its discretion to determine compensation recoverable from the Fund, a DRP ought only to compensate for spot market trading losses. Snowy, on the other hand, contends that cl.3.16.2(d) imposes no limitation on the amount of compensation recoverable from the Fund and simply prescribes that, in determining the level of compensation to which Market Participants are entitled, the spot price to be used will be the spot price as determined under cl. 3.9.

98. The key provision is cl. 3.16.2 (d). It provides:

> "In determining the level of compensation to which Market Participants are entitled, the spot price to be used will be the spot price as determined under cl.3.9".

These words mean and can only reasonably mean that the spot price to be used in the determination of compensation will be the spot price under cl.3.9. The words do not say that compensation from the Fund shall be limited to spot market trading losses. Had this result been intended, one would have expected it to be expressed instead of resorting to a form of words which express a very different but appropriate rule for use in arriving at spot market trading losses. The word "level" is used in cls. 3.16.2 (d) and (e), instead of "amount" which is used in cl. 3.16.2(a). But this seems to have no significance as in each case the provisions are dealing with "determining" the amount of compensation which is payable or to be paid or to which a market participant is entitled.

99. NEMMCO relies on policy considerations and the history, including the Victorian Power Exchange Rules, to support the interpretation which it seeks to give to cl. 3.16.2(d). These considerations cannot overcome the clear words in which the clause is expressed. As McHugh J noted in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109:

> "When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation."

100. Further, the Rules expressly contemplate that hedge contracts and other financial risk management tools will be availed of by market participants. Rule 3.7A specifically requires NEMMCO to provide market participants with information on planned network outages so that they make decisions on hedge contracts and other financial risk management tools.

101. In this context, compensation for losses in addition to spot market trading losses is payable out of the Fund, in the absence of an express exclusion of, or limitation on, the recovery of such losses.

102. NEMMCO's argument that a DRP should, in the exercise of its discretion, only allow recovery of spot wholesale electricity trading revenue caused by a scheduling error must also be rejected. It may be that, in the light of the evidence and circumstances of a particular case, a DRP might properly exercise its discretion to limit the compensation recoverable in the manner suggested by NEMMCO. We do not consider, however, that the relevant rules, on their proper interpretation, mandate this approach as an absolute rule to be applied in every case.

103. Accordingly, we answer question (b) in para. 5 above "No".

The role of NEMMCO in the determination by the DRP of compensation payable from the Fund.

104. Snowy's case on this question is that NEMMCO has no role under the Rules to contest the payment of compensation from the Fund to market participants affected by a scheduling error. Snowy says that NEMMCO is neither the trustee of the Fund nor a beneficiary of it, that it is authorised to pay applicable taxes, duties and bank fees out of the Fund and otherwise is required to make payments from the Fund solely in accordance with determinations made by a DRP.

105. Snowy acknowledges that a DRP may seek the assistance of NEMMCO in the discharge by a DRP of its duties under cl.3.16 in determining compensation payable from the Fund. Snowy contends, however, that NEMMCO's role is limited to providing evidence or other information in a form satisfactory to the DRP (if so required) relating to:

(a) the matters referred to in cll.3.16.2(c), (d) and (e);

(b) the relevant balance of the Fund as referred to in sub-cl. 3.16.2(e); and/or

(c) compensation payments made or which may be made from the Fund during the relevant year as referred to in sub-cl.3.16.2(f).

106. Snowy argues or has argued that a DRP's function in determining compensation payable from the Fund is administrative, not adversarial, an argument which is strongly contested by NEMMCO.

107. NEMMCO is correct when it says that, in determining compensation, a DRP is determining a dispute. A DRP is established under the Rules in order to determine a

dispute. In the case of a scheduling error, the dispute extends not only to the existence of such an error but also to the claim for compensation from the Fund. The Rules evidently treat a determination by a DRP that a payment shall be made from the Fund to a market participant as an obligation of a party to a "dispute" (cl.8.2.6D(e)).

108. In the present case, the dispute was framed as a dispute between Snowy and NEMMCO about scheduling errors by NEMMCO with a consequential claim for compensation for the alleged errors. To the extent that Snowy's claim was for compensation, it gave rise to a dispute of the kind set out in cl. 8.2.1(a) because it was a dispute about the application or interpretation of the Rules or the payment of money under the Rules (ch.8.2.1(a)(1) and (5). The dispute so framed could expand into a dispute involving other parties once the DRP finds that there were scheduling errors. In that event, other market participants might seek to claim against the Fund, with the consequence that they might contest Snowy's claim. But if this were to transpire, it would not affect the initial characterisation of the dispute as one between Snowy and NEMMCO and as one which extended to the Snowy claim against the Fund.

109. NEMMCO is required to maintain in its books the Fund "for the purpose of paying compensation to Scheduled Generators and Scheduled Network Service Providers as determined by the (DRP) for scheduling errors under this Chapter 3" (cl.3.16.1(a)). NEMMCO is required to pay into the Fund that component of Participant fees under clause 2.11 attributable to the (Fund)" (cl.3.16.1(b)).

110. Clause 3.16.1(d) provides “The (Fund) is to be maintained by NEMMCO and is the property of NEMMCO”. Further, NEMMCO is required to pay income tax on interest earned by the Fund and must pay duties and bank fees in relation to the Fund (cl.3.16.1(f)).

111. As NEMMCO is the proprietor of the Fund, though its ownership is for the purpose of paying compensation to others as determined by the DRP, a claim made against the Fund gives rise to proceedings against the Fund in which NEMMCO, as proprietor, has an interest in participating, even if only to ensure that the Fund is disbursed for proper purposes.

112. Further, cl.3.16 speaks consistently of the DRP determining or making a determination both as to scheduling error and as to which market participants may receive compensation and the amount of compensation payable from the Fund. The use of the words “determining” and “determination” indicate that a DRP’s function is not an idiosyncratic discretionary exercise but an objective determination to be made by applying ascertained or ascertainable criteria.

113. As the legal proprietor of the Fund, NEMMCO has a sufficient interest to maintain the integrity of the Fund and to take steps to assist in ensuring that payments out of the Fund are made in accordance with the objects of the Fund and not otherwise. Consequently NEMMCO can participate in proceedings for a determination of a claim

for compensation from the Fund so as to ensure that all relevant information is placed before the DRP and that the validity and substance of the claim is properly tested.

114. Difficulties may arise for NEMMCO when it is confronted with competing claims against the Fund. These difficulties will be reduced to a minimum once it is recognised that NEMMCO does not enjoy the full rights of participation of an adversary party and that its rights of participation are limited in the manner described in the preceding paragraph.

115. Snowy's concession that NEMMCO can assist the DRP, if invited so to do by the DRP, is not a satisfactory answer. According to Snowy's argument, that assistance would be limited to providing limited information i.e. the matters referred to in cls. 3.16.2(c), (d) and (e), the relevant balance of the Fund (cl. 3.16.2(e); and/or the compensation payments made or which may be made from the Fund during the relevant year (cl.3.16.2(f). That limited assistance would not extend to any examination or comment on a claim against the Fund.

116. We therefore answer question (c) in para. 5 above as follows:

"NEMMCO is entitled to participate in the proceedings for determination of compensation by the DRP as a party with the rights described in para. 113 above."

DATED the 1st day of February 2007.

signed A.F. Mason
Sir Anthony Mason AC KBE