

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

Macquarie Generation

Applicant

and

National Electricity Market Management Company Limited ACN 072 010 327

Respondent

**NEMMCO'S SUBMISSION TO
THE DISPUTE RESOLUTION PANEL**

4 April 2008

1 BACKGROUND

1.1 At the directions hearing of 20 March 2008, the Dispute Resolution Panel (“**DRP**”) requested the parties’ views on the following:

- (a) the meaning of “year” in clause 3.16.2(h) of the Rules;
- (b) the meaning of “the potential for further liabilities to arise during the year” in clause 3.16.2(h)(4); and
- (c) the meaning of clause 3.16.2(i) which provides for the manner and timing of payments.

1.2 In preparing this submission, NEMMCO has had the benefit of seeing Macquarie Generation’s submission.

2 MEANING OF “YEAR”

- 2.1 NEMMCO agrees with Macquarie Generation’s submission that “year” in clause 3.16.2(h) means a financial year for the reasons outlined that submission.

3 “POTENTIAL FOR FURTHER LIABILITIES”

- 3.1 Clause 3.16.2(h)(4) requires the DRP, in determining the level of compensation, to “take into account the current balance of the *Participant compensation fund* and the potential for further liabilities to arise during the year”.
- 3.2 NEMMCO considers the intention of these words is to require the DRP to consider whether awarding the claimant the compensation otherwise determined would exhaust the Fund to the detriment of other claimants in that year. In short, the intention does not appear to endorse a “first in, best dressed” approach.

Meaning of “potential”

- 3.3 The first question is the meaning of “potential” in this context. Ultimately, a liability must arise from a claim on the Participant Compensation Fund (**Fund**). This raises the issue as to how developed a claim must be at the time of making a determination. There are a number of possibilities:
- (a) claims actually made (but not yet determined);
 - (b) claims notified, that is, where NEMMCO or the DRP is notified or aware of circumstances potentially giving rise to a claim that is not yet made;
and
 - (c) the mere potential for a claim to be made, such as where NEMMCO has declared a scheduling error that could give rise to other claims at the time of making the determination, even though there is no evidence that any claim will be made.
- 3.4 It is NEMMCO’s submission that the only claims the DRP should consider is the first type, that is, claims actually made, but not yet determined.

Meaning of “liabilities”

- 3.5 The second question is whether “liabilities” means contingent or actual liabilities. Depending on its context, “liability” can include potential or contingent liabilities (*Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59*).
- 3.6 In this context, NEMMCO agrees with Macquarie Generation that the better interpretation is that it means actual liabilities in the sense of an order from a DRP requiring payment from the fund. This is consistent with the apparent intention of the clause to consider the impacts of claims on the Fund on a yearly basis. This is presumably because the Fund can be replenished, to some degree, in the following year. It is unlikely that the drafter’s intention was for the DRP to discount a valid claim before it on the basis of the potential for a contingent liability to arise in the year where the contingent liability crystallizes in following years, if at all.

Practical difficulties for the DRP faced with more than one claim

- 3.7 Such a conclusion, however, is not without its difficulties. The question a DRP must grapple with is whether it will be in a position to determine the potential for a liability to arise against the Fund from a claim that will be before another DRP.
- 3.8 The extent of this difficulty can be illustrated by considering the only other scheduling error claim considered by a DRP in the history of the Fund. The first notice of a claim received by NEMMCO was by letter dated 21 November 2005. A First Stage DMS Notice was received on 21 January 2006 and a Second Stage Notice on 17 July 2006. The quantum of the claim was not stated in either of the two Notices, but it was understood that the claimant was claiming losses in excess of \$25 million. Ultimately, after a number of hearings where both liability and quantum were contested, the amount ordered to be paid to the claimant was \$436,783.89 on 18 October 2007.
- 3.9 Nevertheless, it follows from NEMMCO’s submission that the DRP would only need to take into account a claim where it is likely to give rise to payment from the Fund in the same year as the claim presently before it.
- 3.10 The DRP would face very difficult issues of balancing the interests of a valid claimant before it and a future claimant whose entitlement has not crystallized in circumstances where the DRP might have to pre-empt the determination of another DRP.

Are there competing claims this year?

3.11 In paragraph 86 of the first joint submission, NEMMCO advised that :

There have been no other formal claims for compensation for scheduling errors in recent years. Since the incident on 22 October 2007, NEMMCO has not declared any further scheduling errors. However, NEMMCO has been advised by another Market Participant that it is seeking legal advice to establish whether a problem it has been raising constitutes a scheduling error. The participant has made an unsubstantiated comment to NEMMCO that it had been disadvantaged by more than \$7 million. NEMMCO is not aware of the legal reasoning on which it is being asserted that scheduling error arose. No further indication has been received from the participant since 7 February 2008.

3.12 Despite this, NEMMCO considers there are reasonable grounds for the DRP to determine that there are no other claims that are likely to give rise to a payment from the Fund this financial year such as to justify reducing Macquarie Generation's entitlement to compensation.

3.13 First, this is not an actual claim made on the Fund.

3.14 Second, if the DRP is required to take into account the existence of circumstances which might give rise to a claim, then in NEMMCO's view it would be very unlikely that a claim made on the Fund now in relation to these circumstances could be determined before 30 June 2008. This does not take into account the practical difficulties of a DRP assessing the merits of a claim which has not yet been made.

3.15 Third, even if the DRP is required to take into account the mere potential for other claims to be made:

- (a) again, it is very unlikely another claim could be made now that could be determined by the end of the financial year; and
- (b) the history of claims on the fund (two in 10 years) is not sufficient to lead to an expectation of other claims arising (of which there has not been any notice) this financial year, particularly since NEMMCO has not declared any further scheduling errors.

- 3.16 Even if the DRP is required to take into account potential claims, it has reasonable grounds in this particular case to order a compensation payment to Macquarie Generation from the Fund without reduction for other claims.

Pro-rating methodology

- 3.17 Macquarie Generation's submission provides two methodologies to address the issue of how to approach a determination of the potential for other liabilities in a year, however, the facts presently before the DRP do not give rise to the need for a decision between these methodologies.
- 3.18 NEMMCO does not dismiss the merits of the pro-rating methodology. The payment deferral mechanism provides a fair and equitable approach and NEMMCO can see a basis for taking this approach under clause 3.16.2.
- 3.19 If this was a case where competing claims could reasonably give grounds to a reduce a valid claim, then it would warrant further investigation by the DRP as to whether it is consistent with the intention of clause 3.16.2. However, this is not such a case.

4 MANNER AND TIMING OF PAYMENTS

- 4.1 Clause 3.16.2(i) provides that the "manner and timing of payments from the *Participant compensation fund* are to be determined by the *dispute resolution panel*".
- 4.2 This could be construed as either:
- (a) a substantive provision giving a DRP rights to determine how the compensation is to be determined in the first place (and therefore providing support for the pro-rating methodology); or
 - (b) merely an ancillary provision giving a DRP flexibility about how compensation, once determined, is to be paid.

NEMMCO
4 April 2008