IN THE DISPUTE RESOLUTION PANEL AT MELBOURNE

(Constituted for a determination as to compensation under clause 3.16.2 of the National Electricity Rules)

BETWEEN

Woodlawn Wind Pty Limited (ABN 38 139 165 610)

Lake Bonney Wind Power Pty Limited (ABN 48 104 654 837) (**Infigen**)

and

Australian Energy Market Operator Limited (ABN 94 072 010 327) (**AEMO**)

REASONS FOR DETERMINATION
(National Electricity Rules, clause 3.16.2)

1. Woodlawn Wind Pty Limited (**Woodlawn Wind**) and Lake Bonney Wind Power Pty Limited (**Lake Bonney**), apply for a determination as to compensation under clause 3.16.2 of the National Electricity Rules (**the Rules**) for the lost opportunity to create renewable energy certificates pursuant to s 18 of the *Renewable Energy (Electricity) Act 2000* (Cth) (**Renewable Energy Act**), in circumstances where they lost that opportunity because of a *scheduling error*[1] (**REC losses**).

2. In these reasons, we consider whether REC losses are compensable pursuant to clause 3.16.2. If they are, then this matter will proceed to a quantification of compensation. If they are not compensable under clause 3.16.2, that is the end of the matter.

3. We have received three sets of written submissions each from the parties and a two-volume set of referenced documents. A formal, transcribed, hearing was conducted on 14 November 2012.

4. As we explain in these reasons, we have concluded that REC losses are not compensable under clause 3.16.2.

FACTS AND LEGISLATIVE FRAMEWORK

The UIGF scheduling error and clause 3.16.2 of the Rules

5. On 7 June 2012, AEMO declared in its Scheduling Error Report entitled "Incorrect Unconstrained Intermittent Generation Forecasts for Semi-Scheduled Generators" that it had failed to follow the *central dispatch* process set out in rule 3.8. By reason of AEMO's declaration there is, for the purposes of the Rules, a *scheduling error*: clause 3.8.24(a)(2) (**the UIGF scheduling error**).

[1] Italicised expressions in these reasons have the meanings defined in Chapter 10 of the National Electricity Rules. The Rules have the force of law in the two jurisdictions relevant to this matter, New South Wales and South Australia, pursuant to s 9 of the *National Electricity (NSW) Law* and s 6 of the *National Electricity (New South Wales) Act 1997* (NSW), and pursuant to s 9 of the *National Electricity (South Australia) Law* and s 6 of the *National Electricity (South Australia) Act 1996* (SA).

6. The UIGF scheduling error had its origins in the implementation of *National Electricity Amendment (Central Dispatch and Integration of Wind and Other Intermittent Generation) Rule 2008 No. 2 (**the 2008 Rule change**).*

7. Each of the two applicants is a *Market Participant* and, relevantly, a *Semi-Scheduled Generator.* As such, clause 3.16.2 of the Rules confers on each of them an entitlement to compensation in respect of a *scheduling error* upon application to the *dispute resolution panel*.

8. The following provisions of clause 3.16.2 are relevant:

(a) Where a *scheduling error* occurs, a *Market Participant* may apply to the *dispute resolution panel* for a determination as to compensation under this clause 3.16.2.

(b) Where a *scheduling error* occurs, the *dispute resolution panel* may determine that compensation is payable to *Market Participants* and the amount of any such compensation payable from the *Participant compensation fund*.

(c) A determination by the *dispute resolution panel* as to compensation must be consistent with this clause 3.16.2.

(d) A *Scheduled Generator* or *Semi-Scheduled Generator* who receives an instruction in respect of a *scheduled generating unit* or *semi-scheduled generating unit* (as the case may be) to operate at a lower level than the level at which it would have been instructed to operate had the *scheduling error* not occurred, will be entitled to receive in compensation an amount determined by the *dispute resolution panel*.

(e) [in similar terms to subclause (d), but relates to a "*Scheduled Network Service Provider* who receives an instruction in respect of its *scheduled network services* to transfer less *power* on the *scheduled network service...".*]

(f) A *Scheduled Generator* or *Semi-Scheduled Generator* who receives a *dispatch instruction* in respect of a *generating unit* to operate at a level consistent with a *dispatch offer price* (with reference to the relevant *regional reference node*) which is higher than the *dispatch price*, due to the operation of clause 3.9.2B, is entitled to receive in compensation an amount determined by the *dispute resolution panel*.

(g) [in similar terms to subclause (f), but relates to a "*Scheduled Network Service Provider* who receives an instruction in respect of its *scheduled network services* to transfer *power* on the *scheduled network service..."* and receives less than expected revenue due to an adjustment of the *spot price* for a trading interval under clause 3.9.2B.]

(h) In determining the level of compensation to which *Market Participants* are entitled in relation to a *scheduling error*, the *dispute resolution panel* must:

(1) Where the entitlement to compensation arises under clause 3.16.2(f), determine compensation on the basis of the actual loading level and not the *dispatch instruction* applicable to the relevant *scheduled generating unit* or *semi-scheduled generating unit* for that *dispatch interval*;

(2) Where the entitlement to compensation arises under clause 3.16.2(g), determine compensation on the basis of the actual loading level and not the *dispatch instruction* applicable to the relevant *scheduled network service* for that *dispatch interval*;

(3) Use the *spot price* as determined under rule 3.9, including any *spot prices* that have been adjusted in accordance with clause 3.9.2B;

(4) Take into account the current balance of the *Participant compensation fund* and the potential for further liabilities to arise during the year;

(5) Recognise that the aggregate liability in any year in respect of *scheduling errors* cannot exceed the balance of the *Participant compensation fund* that would have been available at the end of that year if no compensation payments for *scheduling errors* had been made during that year.

(i) The manner and timing of payments from the *Participant compensation fund* are to be determined by the *dispute resolution panel*.

(j) To the maximum extent permitted by law, *AEMO* is not liable in respect of a *scheduling error* except out of the *Participant compensation fund* as contemplated by this clause 3.16.2.

9. The *Participant compensation fund* is administered by AEMO and is made up of contributions from *Scheduled Generators*, *Semi-Scheduled Generators* and *Scheduled Network Service Providers*, recovered through *Participant fees* levied by AEMO. Clause 2.11.3 relevantly provides:

> (a) *AEMO* must prepare and *publish* before the beginning of each *financial year* a budget of the revenue requirements for *AEMO* for that *financial year*.
>
> (b) The budget prepared by *AEMO* under clause 2.11.3(a) must take into account and separately identify projected revenue requirements in respect of:
>
> ...
>
> (8) the funding requirements of the *Participant compensation fund* in accordance with rule 3.16 (which requirements must only be recovered from *Scheduled Generators*, *Semi-Scheduled Generators* and *Scheduled Network Service Providers*).

10. The references in clause 3.16.2 to adjusted *spot prices* under clause 3.9.2B are easily explained. With effect on 1 June 2006, *National Electricity Amendment (Revision of Dispatch Pricing Due to Manifestly Incorrect Inputs) Rule 2006 No. 1* inserted new clause 3.9.2B, enabling NEMMCO (now AEMO) to change *dispatch prices* (and therefore *spot prices* derived from the relevant *dispatch prices*) to correct for the effect of manifestly incorrect inputs, provided this was done within 30 minutes of publication of the affected *dispatch prices*. At the same time, clause 3.16.2 was omitted and replaced in a form closely resembling its current form.

11. Clause 3.16.2 appears in Chapter 3 of the Rules, entitled "Market Rules". Clause 3.1.1 introduces Chapter 3 with a description of the scope or purpose of the Chapter. Clause 3.1.1 relevantly states that the Chapter sets out "the procedures which govern the operation of the market relating to the wholesale trading of electricity ...", and that it includes provisions relating to:

> (a) *prudential requirements* to be met for participation in the *market*;
> (b) the operation of the *spot market*;
> (c) bidding and *dispatch*;
> (d) *spot price* determination;
> (d1) the determination of *ancillary service prices*;
> (e) *AEMO* clearing house and trading functions;
> (f) *market* information requirements and obligations;
> (g) the conditions and procedures for *market suspension*; and
> (h) *settlements*.

12. The *dispute resolution panel* is defined in Chapter 10 as being established by clause 8.2.6A. That provision is part of rule 8.2, entitled "dispute resolution". The kinds of dispute to which that rule applies are set out in clause 8.2.1, introduced by a description ("dispute ... between two or more *Registered Participants* about ..."). For the purposes of rule 8.2 only, AEMO is deemed to be a *Registered Participant* (clause 8.2.1(a1)). Each of the categories of dispute mentioned in clause 8.2.1 has a close connection with the Rules. The present matter falls within clause 8.2.1(a)(1) or (8), being a dispute about "the application or interpretation of the *Rules*" and "any other matter that the *Rules* provide may or must be dealt with under this rule 8.2".

13. Clause 3.16.2 confers entitlements on *Market Participants,* which are defined relevantly to include *Market Generators*.

14. An explanation of the categories of *Registered Participants* created by Chapter 2 of the Rules is required.

(a) Companies that own, operate or control *generating units* that are *connected* and supply electricity to a *transmission system* or a *distribution system* are registered as *Generators*. Such *transmission systems* and *distribution systems* form part of the *national grid.*

(b) A *Market Generator* is a *Generator* which has classified at least one *generating unit* as a *market generating unit* in accordance with Chapter 2 of the Rules and which is also registered by AEMO as a *Market Generator* under Chapter 2. The relevant provision of Chapter 2 is clause 2.2.4. Clause 2.2.4(a) in effect defines a *market generating unit* as one "whose *sent out generation* is not purchased in its entirety by the *Local Retailer* or by a *Customer* located at the same *connection point*". Clause 2.2.4(b) provides "A *Generator* is taken to be a *Market Generator* only in so far as its activities relate to any *market generating units*." Clause 2.2.4(c) requires a *Market Generator* to "sell all *sent out generation* through the *spot market* and accept payments from *AEMO* for *sent out generation* at the *spot price* applicable at the *connection point* as determined for each *trading interval* in accordance with the provisions of Chapter 3".

(c) Further, *Generators* may either be *Non-Scheduled Generators*, *Scheduled Generators* or (since the 2008 Rule change) *Semi-Scheduled Generators*. *Non-Scheduled Generators* are generally not subject to instructions by AEMO as to the level of output they are to supply to the NEM for each 5-minute *dispatch interval*. In other words, they are not subject to the *central dispatch* process set out in rule 3.8. *Scheduled Generators* are subject to the *central dispatch* process for each 5-minute *dispatch interval*.

15. Until the 2008 Rule change, *Generators* operating *generating units* that produced electricity intermittently such as wind farms were *Non-Scheduled Generators*.

The 2008 Rule change

16. The 2008 Rule change required *generating units* that produce electricity intermittently, and that (either alone or in a group *connected* at a common *connection point*) have a *nameplate rating* of 30MW or over, to be classified under Chapter 2 of the Rules as *semi-scheduled generating units*. The owner, operator or controller of a *semi-scheduled generating unit* is a *Semi-Scheduled Generator* insofar as its activities relate to a *semi-scheduled generating unit.*[2]

17. Under the 2008 Rule change, *Semi-Scheduled Generators* and *semi-scheduled generating units* became subject to the *central dispatch* process. The AEMC's Rule determination in relation to the 2008 Rule change explained the reasons for this development in the following terms:

> Currently, non-scheduled generating units are not required under the Rules to participate in central dispatch nor are they obliged to control their output to assist in the management of network flows. Large intermittent generators such as wind farms are currently registered as Non-Scheduled Generators because they cannot practically comply with some of the Rule requirements for Scheduled Generators such as following a dispatch target. Wind farms are increasing in capacity and are beginning to have material impacts on network congestion and power system security. This is creating challenges for NEMMCO in efficiently managing the operation of a secure power system. This problem is expected to increase in severity as the growth in wind farm development continues.

[2] Clause 2.2.7(g) of the Rules.

> NEMMCO's Rule change proposal seeks to integrate significant intermittent generating units (such as wind farms) into the central dispatch and projected assessment of system adequacy (PASA) processes in order to enhance system security and reliability. Under NEMMCO's proposal, all new intermittent generators greater than 30 MW would be required to register under a new classification of "Semi-Scheduled Generator", submit and receive dispatch information in a similar manner to scheduled generating units, and limit their output at times when that output would otherwise violate secure network limits.

18. AEMO has interrelated functions under the "Market Rules" in Chapter 3. Relevantly, AEMO is required both:

    (a) to operate and administer the *spot market* (clause 3.2.2 and rule 3.4); and

    (b) (subject to the specific *power system security* provisions in Chapter 4) to manage the day to day operation of the *power system*, using reasonable endeavours to maintain *power system security* in accordance with Chapter 3 (clause 3.2.3 and rule 3.8).

19. These two roles are interdependent, as recognised in clause 3.8.1. The *central dispatch* process in rule 3.8 is clearly intended to be the primary means of operating the *power system* so as to maintain *system security*, and also to implement *spot market* trading outcomes, ultimately leading to settlements between *Market Participants*. Such settlements will involve payment to *Generators* for electricity *dispatched*, as calculated by application of the *spot price* at the *regional reference node* (duly adjusted for *loss factors* and thus converted to a spot price at the relevant *connection point*) to the amount of electricity *dispatched* each *trading interval*.

20. Under the *central dispatch* process, in certain *dispatch intervals* (known as *semi-dispatch intervals*) a *Semi-Scheduled Generator* is now subject to electronic *dispatch instructions* from AEMO's system NEMDE, by which the *Semi-Scheduled Generator* is instructed to increase or reduce the quantity of electricity a *semi-scheduled generating unit* produces for the *semi-dispatch interval*. During a *semi-dispatch interval* the output for a *semi-scheduled generating unit* must not exceed a *dispatch level* specified by NEMDE in the relevant *dispatch instruction*.

21. *Central dispatch* applies an input known as an *unconstrained intermittent generation forecast* (**UIGF**) as an upper limit on NEMDE's calculation of *dispatch level* for the relevant *semi-scheduled generating unit*.

22. In certain circumstances, NEMDE has, on many occasions over an extended period, applied a UIGF as an upper limit on the *dispatch level* of a *semi-scheduled generating unit* which was incorrectly low.

23. AEMO's report of the UIGF scheduling error explains the nature of the error in detail. The error is also described in the Joint Submission of the parties in a dispute resolution process initiated by AGL Hydro Partnership in relation to the UIFG scheduling error and in the reasons for determination of the *dispute resolution panel* in that matter, dated 27 November 2012. The present applicants were parties to that matter.

24. As explained in the materials referred to in paragraph 23 above, the UIGF scheduling error occurred in various *dispatch intervals* potentially dating back as far as 31 March 2009, when semi-scheduled generation was first introduced. The cause lay in the way arrangements were initially made to provide for computerised *dispatch* of electricity from *generating units* that have intermittent output (eg wind farms). AEMO (erroneously) gave *Semi-Scheduled Generators* the option of not employing a feature known as the "control system set point". For *Semi-Scheduled Generators* which did not employ the control system set point, a system known as AWEFS reported levels of

available output that were incorrectly low in certain circumstances, and the *central dispatch* process (using the system known as NEMDE) relied upon those levels in giving *dispatch instructions* to the affected *generating units*.

25. As a result of the UIGF scheduling error, it is clear that in various *dispatch intervals* since each relevant *semi-scheduled generating unit* first became semi-scheduled, the level at which the unit had been *dispatched* by the *central dispatch* process has been lower than dictated by a proper application of rule 3.8.

Spot market **losses and REC losses**

26. But for the UIGF scheduling error, the affected *Semi-Scheduled Generators*, including the two applicants, would have operated at a higher level of generation and would have been entitled to earn revenue for the sale of additional electricity at the applicable *spot price*. We will refer to such losses as ***spot market*** **losses**.

27. Woodlawn Wind and Lake Bonney are both *Market Participants*. Woodlawn Wind is a *Semi-Scheduled Generator* which has one wind farm in the New South Wales *region* of the NEM. That wind farm first became a *semi-scheduled generating* unit on 3 May 2011. Lake Bonney is a *Semi-Scheduled Generator* that has two wind farms in the South Australia *region* of the NEM, Lake Bonney Wind Farm Stage 2 and Lake Bonney Wind Farm Stage 3. These wind farms first became semi-scheduled on 9 September 2010 and 2 July 2010 respectively.

28. On 30 October 2012 a *dispute resolution panel* constituted by a single member was appointed to determine compensation in respect of the UIGF scheduling error on agreed principles. The agreed principles related only to *spot market* losses. Additional *Semi-Scheduled Generators* opted in to that dispute resolution process pursuant to clause 8.2.6B(c). The agreed principles of compensation did not extend to compensation for REC losses. The *dispute resolution panel* gave its determination in that matter on 27 November 2012.

29. Woodlawn Wind and Lake Bonney are entitled to compensation for their *spot market* losses, as already determined by the *dispute resolution panel* in the other matter, dated 27 November 2012.

30. Woodlawn Wind and Lake Bonney are also accredited power stations under the Renewable Energy Act. Woodlawn Wind was accredited in respect of its wind farm on 31 May 2011. Lake Bonney was accredited in respect of its Wind Farm Stage 2 on 2 July 2007, and was accredited in respect of its Wind Farm Stage 3 on 28 May 2010.

31. Section 18 of the Renewable Energy Act, headed "Creating certificates for additional renewable electricity", has at all material times provided for a person nominated by an accredited power station to create a certificate for each whole MWh of electricity generated by the power station from renewable sources during a year that is in excess of a baseline established by reference to the amount of renewable energy that the power station generated in 1997. For Woodlawn Wind and Lake Bonney, that baseline was zero. Before 1 January 2011, any such certificate was known as a renewable energy certificate. Since 1 January 2011, the kind of certificate of relevance to this matter has been known as a large-scale generation certificate. We will refer to any certificate that the applicants were capable at any material time of creating under the Renewable Energy Act simply as a **REC**.

32. At the time of the 2008 Rule change (and for eight years before that), a power station that generated electricity from renewable sources was thus entitled to become accredited under the Renewable Energy Act and to create a REC for each MWh it generated above the 1997 baseline. Each REC so created could be registered and

transferred for valuable consideration. The revenue from RECs was (and was intended by the Parliament in enacting the Renewable Energy Act) and is an important statutory incentive offered to those investing in such power stations. It can safely be inferred that such revenue is a significant component of the overall revenue of such power stations.

33. The effect of bringing such power stations (under the name of *Semi-Scheduled Generators*) into the *central dispatch* process under the Rules is to impose a constraint on their ability to generate electricity and thus to earn revenue from the creation and sale of RECs as well as from the sale of electricity.

34. There is no mention of RECs in the AEMC's Rule determination accompanying the 2008 Rule change.

35. Woodlawn Wind and Lake Bonney have suffered, as a direct result of the UIGF scheduling error, not only *spot market* losses, but also REC losses.

36. On 1 November 2012, Woodlawn Wind and Lake Bonney served an *Adviser referral notice* pursuant to clause 8.2.5 of the Rules. By the notice, they applied for compensation pursuant to clause 3.16.2 for REC losses in respect of the UIGF scheduling error.

37. On 7 November 2012, this *dispute resolution panel* was appointed to determine Woodlawn Wind's and Lake Bonney's application for compensation for REC losses.

38. The preliminary question now before us, as mentioned in paragraph 2 above, is whether REC losses are compensable under clause 3.16.2.

CONSIDERATION OF THE ISSUES AND CONCLUSIONS

General approach

39. The preliminary question is one of statutory construction and might be expected to admit of a clear answer: either REC losses fall within, or outside, the scope of clause 3.16.2.

40. In addition to advancing submissions on the question of construction, AEMO contends that, even if REC losses are compensable under clause 3.16.2, the *dispute resolution panel* should in the exercise of our discretion not entertain the application because contributions to the *Participant compensation fund* have not been arranged on a footing that treats *Semi-Scheduled Generators* as having an entitlement to compensation for such losses. It is said that REC losses are a form of loss to which only *Semi-Scheduled Generators* are exposed, but that contributions made to the *Participant contribution fund* have not been obtained on a basis that reflects any exposure to payment of compensation for a differential risk of this kind, and so if *Semi-Scheduled Generators* were to be compensated for such losses, this would amount to a form of cross-subsidy from the other contributors to the fund.

41. It is uncertain whether we have such a discretion. Even assuming such a discretion exists, we do not consider it appropriate to resolve the preliminary issue in this way. The arrangement of contributions is subject to alteration by AEMO from time to time as an administrative exercise under rule 2.11. If the applicants' REC losses are compensable under clause 3.16.2, we would not be persuaded that we should dismiss the claim merely because of the manner in which contributions have been obtained in the past. We consider this conclusion to be consistent with the approach adopted by the *dispute resolution panel* constituted by the Hon Sir Anthony Mason AC KBE, Mr GH Thorpe and Mr K Brown in *Snowy Hydro Limited and NEMMCO*, decision dated 1

February 2007 (***Snowy No 1***) at [102]. Obviously, if the REC losses are not compensable the question of discretion does not arise.

42. According to the recent line of High Court authority, the task of statutory construction must begin with consideration of the text itself. The language actually employed in the text of the legislation is the surest guide to the legislative intention.[3] That does not mean that the text of clause 3.16.2 is to be construed in isolation from the rest of the Rules; on the contrary, the meaning of clause 3.16.2 must be determined "by reference to the language of the instrument viewed as a whole".[4] The High Court has also said that the process of construction must always begin by examining the context of the provision that is being construed,[5] and that proper understanding of the policy and purpose of the relevant instrument underpins the task of construing it and identifying its operation.[6] A distillation of these principles is that the "starting point ... is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose".[7]

Important textual issues in clause 3.16.2

43. There are two important textual points arising from the words used in clause 3.16.2. First, the provision confers on the *dispute resolution panel* the power to determine "compensation" in relation to a *scheduling error*, without any expressed limit on the heads of loss for which compensation may be granted, and indeed without referring to "loss" at all. Second, the provisions that the *dispute resolution panel* must apply in the course of determining the amount or level of compensation require it to use the *spot price* as determined under rule 3.9 including any adjusted *spot price* under clause 3.9.2B. The language used is emphatic: the panel "must" use the *spot price.*

44. There are other contextual matters in Chapters 2 and 3 that must also be considered.

The Rules and the amending instrument are silent on the relevant point

45. When the 2008 Rule change brought *Generators* which were intermittently producing electricity from renewable sources into the *central dispatch* process under the Rules (under the name of *Semi-Scheduled Generators*), consequential amendments were made to clause 3.16.2, replacing clause 3.16.2(d) and (f) to cater for Semi-Scheduled Generators, and adding a reference to *semi-scheduled generating unit* to clause 3.16.2(h)(1).[8]

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3 *Alcan Aluminium (NT) Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 (***Alcan***) at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264-265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33; (2011) 244 CLR 508 (***Jemena***) at 527 [50] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

4 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (***Project Blue Sky***) at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ), citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320 (Mason and Wilson JJ).

5 *Project Blue Sky* 194 CLR 355 at 381 [69].

6 *Jemena* 244 CLR 508 at 526 [45] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ), citing *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 at 397 (Dixon CJ), quoted with approval in *Project Blue Sky* 194 CLR 355 at 381 [69]. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

7 *Alcan* 239 CLR 27 at 31 [4] (French CJ).

8 Items [47]-[49] of Schedule 2 to the 2008 Rule change.

46. Perhaps unsurprisingly, given the silence of the Rule determination accompanying the 2008 Rule change as to the existence of an entitlement to RECs, no express treatment appears in the 2008 Rule change in relation to consequential losses which might be suffered by *Semi-Scheduled Generators* as a result of *scheduling errors*. This is despite the fact that RECs were by then already a well-established part of the statutory and commercial framework for such companies in Australia.

Purposive approach

47. Clause 7 of Schedule 2 to the National Electricity Law, which also applies to the construction of the Rules (s 3 of the Law), provides in effect that in the interpretation of a provision of the Law (or Rules), the interpretation that will best achieve the purpose or object of the Law (or, perhaps, the Rules) is to be preferred to any other interpretation.

48. The purpose or object of the Law is encapsulated in section 7 of the Law, the national electricity objective, which provides as follows:

> The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—
>
> (a) price, quality, safety, reliability and security of supply of electricity; and
>
> (b) the reliability, safety and security of the national electricity system.

49. Another possible source of illumination of the purpose to which we are required to have regard is clause 3.1.4(a), which sets out the market design principles to which Chapter 3 is intended to give effect. Particular attention was given in argument to clause 3.1.4(a)(3) and (5):

> (a) This Chapter is intended to give effect to the following market design principles:
>
> ...
>
> (3) avoidance of any special treatment in respect of different technologies used by *Market Participants*;
>
> ...
>
> (5) equal access to the market for existing and prospective *Market Participants*;
>
> ...

50. Each party argues that the construction of clause 3.16.2 for which it contends better promotes the national electricity objective and better reflects the market design principles.

51. Clause 8 of Schedule 2 to the Law is also relevant. It is headed "Use of extrinsic material in interpretation". Relevantly, it provides:

> (1) In this clause—
>
> ***...***
>
> ***ordinary meaning*** means the ordinary meaning conveyed by a provision having regard to its context in this Law and to the purpose of this Law;
>
> ***Rule extrinsic material*** means—
>
> (a) a draft Rule determination; or
>
> (b) a final Rule determination; or
>
> (c) any document (however described)—
>
> (i) relied on by the AEMC in making a draft Rule determination or final Rule determination; or

(ii) adopted by the AEMC in making a draft Rule determination or final Rule determination.

...

(2a) Subject to subclause (3), in the interpretation of a provision of the Rules, consideration may be given to Law extrinsic material or Rules extrinsic material capable of assisting in the interpretation—

(a) if the provision is ambiguous or obscure, to provide an interpretation of it; or

(b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or

(c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

(3) In determining whether consideration should be given to Law extrinsic material or Rule extrinsic material, and in determining the weight to be given to Law extrinsic material or Rule extrinsic material, regard is to be had to—

(a) the desirability of a provision being interpreted as having its ordinary meaning; and

(b) the undesirability of prolonging proceedings without compensating advantage; and

(c) other relevant matters.

Competing arguments on important textual issues

"Compensation" in relation to a *scheduling error*

52. Clause 3.16.2 refers to "compensation", without any expressed limitation on the heads of loss for which compensation may be determined, provided only that the loss has the requisite relationship (whatever that is) with the *scheduling error*. The introductory words in clause 3.16.2(h) make it clear that the compensation to which *Market Participants* are entitled is compensation "in relation to" a *scheduling error*.

53. Each of clause 3.16.2(d), (e), (f) and (g) describe situations in which the entitlement will arise for the particular categories of *Market Participant* referred to in those provisions. Each of clause 3.16.2(d) and (e) describes a scenario in which the *Market Participant* has been restricted by reason of the *scheduling error* from generating as much electricity or transferring as much *power* as would otherwise have been the case. Clause 3.16.2(f) and (g) are directed to the consequences of adjustments made to the *spot price* by reason of manifestly incorrect inputs (see paragraph 10 above), and are not applicable to the present case.

54. Another noteworthy feature of clause 3.16.2 is the presence of considerations that must be taken into account to ensure that payments out of the *Participant compensation fund* do not exceed the amounts contributed to the fund: clause 3.16.2(h)(4) and (5).

55. Finally, it is noteworthy that clause 3.16.2 not only gives rise to an entitlement to compensation from the *Participant compensation fund*, but also limits the liability of AEMO in respect of a *scheduling error*, at least to some extent: clause 3.16.2(j).

56. Infigen contends that the REC losses are directly caused by the UIGF scheduling error. Although AEMO in its written submissions did not accept "direct" causation of monetary loss attributable to RECs, at hearing it was clear that AEMO did not dispute causation. The debate about "direct" causation is largely semantic in this instance; the more important issue concerns the capacity in which the applicants have suffered the relevant losses. If AEMO had followed the *central dispatch* process correctly, the applicants would have generated additional MWhs of electricity and would have been entitled under the Renewable Energy Act to create a REC for each such MWh. Each such REC would have been valuable, although its precise value would have to be ascertained. For these reasons, we consider that the applicants suffered REC losses

(in the sense we have defined them, as the lost opportunity to create RECs) as a direct result of AEMO's failure to follow the *central dispatch* process set out in clause 3.8.

57. We accept Infigen's submission that "compensation" in its ordinary meaning has the connotation of restoring an applicant to the position that it would have been in but for the relevant error, at least where, as here, the connection between the error and the loss is direct. Taken in isolation, the concept of compensation in clause 3.16.2 could readily encompass a claim for REC losses caused by a *scheduling error.*[9]

58. AEMO's responding argument is that there is an implied limitation to be discerned from various aspects of Chapters 2 and 3 of the Rules (including clause 3.16.2 itself) such that compensation cannot be awarded for losses that are not attributable to activities in the *market*. It contends that causation is not enough to bring a loss within the purview of clause 3.16.2: the loss must be attributable to *market* activity, or in other words a loss that is suffered by an applicant in its capacity as a *Market Participant* and more particularly as a *Semi-Scheduled Generator*. AEMO points to clause 3.1.1 in this regard. Further, it points to clause 2.2.4 and 2.2.7 and seeks support for its contention from the fact that a *Market Generator* is only taken to be such in so far as its activities relate to any *market generating units*, and likewise a *Semi-Scheduled Generator* is only taken to be such in so far as its activities relate to any *semi-scheduled generating units.*

59. Infigen responds to the effect that clauses 2.2.4 and 2.2.7 and the defined expressions *Market Participant* and *Semi-Scheduled Generator* serve to identify the entity which may obtain compensation, not to delimit the heads of loss that are available. In any event, Infigen contends, the REC loss was suffered by Woodlawn Wind and Lake Bonney in a *market* activity, namely its activity of responding to *dispatch instructions*. It contends that the loss in question was attributable to *market* activity: it was caused to Woodlawn Wind and Lake Bonney by reason of *dispatch instructions* issued to them as *Market Participants* and *Semi-Scheduled Generator*, albeit that the loss is a loss of statutory entitlements under the Renewable Energy Act. Infigen contended that finding an implied limitation beyond those expressly imposed by clause 3.16.2(h) would amount to redrafting clause 3.16.2.

60. We consider the arguments advanced by AEMO, summarised in paragraph 58 above, to be persuasive, particularly when considered in light of clause 3.16.2(h)(3).

DRP "must use the spot price" in determining the level of compensation

61. Clause 3.16.2(h)(3) provides that the *dispute resolution panel* "must" (in determining the level of compensation to which *Market Participants* are entitled in relation to a *scheduling error*) "Use the *spot price* as determined under rule 3.9 ...".

62. Infigen accepts that REC losses are not quantifiable by reference to the *spot price*.

63. It is clear that the market for RECs is a different market from the *market* contemplated by the Rules, and that the valuation of REC losses is not connected with the *spot price*, as defined in the Rules. The *market* defined in the Rules is any of "the markets or exchanges described in the *Rules*, for so long as the market or exchange is conducted by *AEMO*."

64. On the face of clause 3.16.2(h)(3), it is not possible to determine a level (or amount) of compensation for REC losses consistently with that provision. A determination as to compensation under clause 3.16.2 must be "consistent" with the clause (clause

[9] Infigen referred to authorities including *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

3.16.2(d)) and in our view the presence of clause 3.16.2(h)(3) is a powerful indication that only those heads of loss that involve the application of the *spot price* are compensable under clause 3.16.2. The obvious example would be *spot market* losses, but there may be others.

65. The parties both pointed to an earlier series of decisions by the *dispute resolution panel*, involving Snowy Hydro Limited, in which consideration was given to the predecessor of clause 3.16.2(h)(3) (clause 3.16.2(d), which was expressed in different terms[10]) and to the compensability of losses other than *spot market* losses.

66. Infigen advances two points about the requirement in clause 3.16.2(h)(3) to use the *spot price*.

    (a) First, Infigen contends that this requirement only applies if the head of loss in question requires the application of a *spot price*. In such cases, the provision is intended to operate as a prohibition on using any notional, hypothetical or recalculated "spot price": only the actual *spot price* that in fact was applied can be used. In this regard, Infigen relies on the decision of the *dispute resolution panel* constituted by the Hon. Sir Anthony Mason AC KBE, the Hon GE Fitzgerald AC QC and Mr GH Thorpe in *Snowy Hydro Limited and NEMMCO*, dated 29 August 2007 (***Snowy No 2***) at [36]: "notional spot prices must be disregarded".[11]

    (b) Second, and in the alternative, Infigen contends that by reason of its related application for compensation for *spot market* losses (decided by a differently constituted dispute resolution panel on 27 November 2012), viewed as one claim the level or amount of compensation it seeks involves the use of the *spot price*.

67. The contention in paragraph 66(a) suggests that clause 3.16.2(h)(3) has meaningful work to do, without it necessarily having to play the role of a global limitation on the purview of clause 3.16.2.

68. AEMO contends, however, that clause 3.16.2(h)(3) does both the work suggested by Infigen, and also the work of imposing a limitation, or giving rise to an implied limitation, on the scope of compensation under clause 3.16.2. For the reasons that follow, we agree.

69. AEMO argues that a proper analysis of the line of decisions, *Snowy No 1*, *Snowy No 2* and *Snowy No 3*, supports its contention that clause 3.16.2(h)(3) imposes an implied limitation on the scope of compensation under clause 3.16.2. Although the previous decisions of a *dispute resolution panel* are not binding on this panel, consistency of decision-making in the dispute resolution process established by the Rules is desirable for many reasons and we would not depart from a conclusion squarely expressed on a contested point by the *dispute resolution panel* in the *Snowy* matters unless we were convinced that the conclusion was plainly wrong (a conviction we would not lightly embrace). In the event, for the reasons that follow, we do not consider that the *Snowy* line of decisions resolves the question now before us.

70. In *Snowy No 1,* the *dispute resolution panel* posed a question (at [5](b)), "whether the DRP is limited to considering market losses when making an award of compensation

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[10] "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 clause 3.9."

[11] There are three *dispute resolution panel* decisions in relation to *scheduling errors* on 31 October 2005 that affected Snowy Hydro Limited: *Snowy No 1* referred to in footnote 3 above; *Snowy No 2* referred to in paragraph 66(b) above; and *Snowy Hydro Limited and NEMMCO*, decision of the *dispute resolution panel* constituted by the Hon Sir Anthony Mason AC KBE, the Hon GE Fitzgerald AC QC and Mr GH Thorpe dated 18 October 2007 (***Snowy No 3***).

from the Participant Compensation Fund". In *Snowy No 1*, that question was answered "No". The decision in *Snowy No 1* contains some expansive statements, indicative of a preliminary view that the predecessor of clause 3.16.2(h)(3) (clause 3.16.2(d)) did not impose any implied limitation on the scope of compensation under clause 3.16.2. This is arguably to be seen at [98], [100] and [101]. However, in order to give these passages their proper weight, it is necessary to consider *Snowy No 2*. Although *Snowy No 1* clearly stands for the proposition that a *Market Participant's* entitlement to compensation under clause 3.16.2 can extend beyond *spot market* losses, we hesitate to conclude that it stands for anything more.

71. AEMO contends that, if and to the extent that *Snowy No 1* might have been read as suggesting that the predecessor of clause 3.16.2(h)(3) could not be seen as imposing an implied limitation, that proposition was rejected in *Snowy No 2*. It suggests that the proper reading of *Snowy No 2* is that the *dispute resolution panel* in that case read the predecessor provision (clause 3.16.2(d)) as imposing a limit on the heads of loss that could be claimed, and that if the actual *spot price* could not be used to determine the level of compensation for that loss, it was not claimable. AEMO points out that at the time of *Snowy No 2*, the applicant was pursuing a claim for price risk contract losses, arguing that the relevant *scheduling errors* caused price effects that caused Snowy losses on those contracts (see [26]). This much may be accepted. AEMO goes on to point out that this claim was not pursued by the time *Snowy No 3* was decided. This also appears to be correct. AEMO contends that this was probably because the *dispute resolution panel* in *Snowy No 2* indicated at [36] that "actual spot prices must be used, and notional spot prices must be disregarded ...". Infigen rightly complains that this last point is a speculative conclusion. Nevertheless, AEMO's reading of *Snowy No 2* is otherwise persuasive. In particular, we note the remarks in *Snowy No 2* at [35], where *Snowy No 1* at [100] was explained and perhaps qualified, it being said that there was no intention "to exclude the possibility that one or more provisions in cl.3.16.2, on their proper construction, might implicitly constitute a material exclusion or limitation".

72. In *Snowy No 3*, the *dispute resolution panel* allowed a claim not only for *spot market* losses, but also for a form of loss referred to as "SRD" (settlement residue distribution) losses. However, in our view, neither the outcome nor the reasoning employed in *Snowy No 3* answers the question of whether losses in the nature of REC losses are compensable. It appears, from the explanation of the methodology needed to quantify SRD losses in the addendum to *Snowy No 2*, that the *dispute resolution panel* suggested to the parties a method of quantifying SRD losses that involved the application of the relevant actual *spot prices*. Thus the fact that SRD losses were compensated in *Snowy No 3* does not mean that the *dispute resolution panel* necessarily reached a conclusion about whether clause 3.16.2(d) (now clause 3.16.2(h)(3)) imposed a limitation such that only heads of loss involving the application of the *spot price* were compensable.

73. The *dispute resolution panel* in *Snowy No 3* considered two competing methodologies for the calculation of SRD losses proposed by Snowy and NEMMCO, and at [21]-[22] ultimately rejected Snowy's methodology and adopted NEMMCO's. On our reading of the decision, to the extent that the methodologies were contentious, they were not contentious in such a way that the choice that was made by the *dispute resolution panel* in that case answers the question currently before us. It was not the characterisation of loss as *market*-related or non-*market*-related that was in issue in *Snowy No 3*. Rather, proximity of causal effect appears to have been the main issue (and that is not in issue here). The *dispute resolution panel* in *Snowy No 3* made its decision on methodology on the ground that Snowy's methodology amounted to a claim "for compensation for total losses flowing from a scheduling error which the Panel has previously determined is not provided for". The *dispute resolution panel* in

Snowy No 3 characterised NEMMCO's narrower methodology as only measuring "the direct effect of reduced dispatch brought about by compliance with a dispatch instruction". We think it is uncontroversial here that the REC losses are a direct effect of reduced *dispatch* brought about by compliance with a *dispatch instruction*.

74. For these reasons, we do not think that the *Snowy* line of decisions resolves the question now under consideration. However, we think that question can readily be resolved by an application of the principles of statutory interpretation outlined in paragraph 42 above.

75. In our view, clause 3.1.1 describes the scope of Chapter 3 in terms that suggest that clause 3.16.2 should be seen as a being a provision ancillary to the operation of the *market* under the Rules. Further, clause 3.16.2 confers entitlements as to compensation on *Market Participants,* and (as explained in AEMO's submissions summarised in paragraph 58 above) the scope of that expression is limited by reference to the capacity in which the relevant entity undertakes its activities.

76. Moreover, the 2008 Rule change was introduced at a time when RECs were a well-established part of the statutory and commercial framework in Australia within which electricity was generated from renewable sources and sold. *Semi-Scheduled Generators* were added to the established *Participant compensation fund* regime without any associated amendment to address the potential for compensation of losses not quantifiable by reference to the *spot price*. The existing compensation provisions required a *dispute resolution panel* to use the *spot price* in determining compensation, and this feature was left untouched and unqualified. It was not suggested in submissions before us that any interested person raised the risk of potential REC losses (or the potential issue of making corresponding contributions to the *Participant contribution fund* for such risk) during the consultations that led to the 2008 Rule change.

77. We have considered clause 3.16.2(j), which provides "[t]o the maximum extent permitted by law" that AEMO "is not liable in respect of a *scheduling error* except ... as contemplated in this clause 3.16.2". We have not found it necessary to reach any conclusion about the scope of this provision but note that it might be arguable that clause 3.16.2(j) is ineffective to exclude liability to the extent that a head of loss is not covered by clause 3.16.2.

78. Each party contended that its preferred construction better promoted the national electricity objective and the market design principles. On balance, we are not persuaded that the question before us can be resolved by reference to competing arguments about the national electricity objective. As to the market design principles, again it is not clear which construction better promotes those principles. There are two principles engaged, clause 3.1.4(a)(3) and (5). As to the first, the notion of "avoidance of any special treatment in respect of different technologies used by *Market Participants*", we consider that Infigen's preferred construction might infringe that principle. That is because the risk of REC losses is a risk only faced by *Semi-Scheduled Generators*. As to the second, it is arguable that the principle of equal access to the market is to some extent infringed by withholding compensation for REC losses.

79. In our view, however, the question before us can and should be resolved by a textual analysis, in light of the contextual matters we have already mentioned. We do not consider that clause 3.16.2(h)(3) bears the construction urged by Infigen. That construction in effect requires clause 3.16.2(h)(3) to be read as if it, and its emphatic “must”, were qualified by words such as "if applicable", or "where relevant". Clause 3.16.2 confers a duty to determine compensation without prescription as to the losses for which compensation is to be granted. We are not persuaded that we should find an

implied qualification on the applicability of clause 3.16.2(h)(3). The expression of such a qualification was of course readily available if it were truly intended that the provision be read in the manner contended for by Infigen. Such an approach was in fact used, albeit for different purposes, in the immediately preceding two provisions, clause 3.16.2(h)(1) and (2).

80. Our conclusion is that the requirement in clause 3.16.2(h)(3) applies to each and every claim of compensation under clause 3.16.2, and that if it cannot be applied, no compensation can be determined. We consider that the implication of a limit on the heads of loss that are compensable under clause 3.16.2 necessarily follows from clause 3.16.2(h)(3). This does not amount to "re-drafting" clause 3.16.2 (as we understood Infigen to contend), but rather reconciling clause 3.16.3(h)(3) with the entirety of the clause.

81. We have also considered Infigen's contention summarised in paragraph 66(b) above. We are not persuaded by that contention. Assuming clause 3.16.2(h)(3) imposes a limitation on the "level" or the amount of compensation to be determined, then it must we think apply to the calculation of all component amounts that make up the "level". Infigen's construction would in this regard involve an unnatural reading of the provision. The more natural reading is that the *spot price* must be used to determine all component amounts that contribute to the "level" of compensation to be determined. There seems no justification for applying that limitation only to some heads of loss and not others.

DETERMINATION

82. We have concluded that REC losses are not compensable under clause 3.16.2 of the Rules. That conclusion necessarily leads to the failure of the application to this *dispute resolution panel*. We determine that compensation is not payable to Woodlawn Wind and Lake Bonney for REC losses.

83. We understand the parties to submit that the costs of this dispute resolution process should be allocated equally. We take that to mean that half of the costs should be allocated to Woodlawn Wind and Lake Bonney together, and that half should be allocated to AEMO.

84. For the avoidance of uncertainty, pursuant to clause 8.2.8(b) of the Rules, we allocate costs as follows:

    (a) half of the costs of the dispute resolution process are to be paid by Woodlawn Wind and Lake Bonney; and

    (b) half of the costs of the dispute resolution process are to be paid by AEMO.

Date: 12 December 2012

The Hon Michael E J Black AC QC

Geoffrey Swier

Peter R D Gray SC