IN THE DISPUTE RESOLUTION PANEL AT MELBOURNE

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

BETWEEN

Lake Bonney Wind Power Pty Ltd (ABN 48 104 654 837)

Woodlawn Wind Power Pty Ltd (ABN 38 139 165 610)

(together **"Infigen"**)

and

Australian Energy Market Operator

(**"AEMO"**)

INFIGEN SUBMISSIONS IN REPLY

A. Introduction

1. These submissions are filed by Infigen in reply to AEMO's submissions dated 8 November 2012 (**AEMO Submissions**).

2. In these reply submissions:

   (a) terms and acronyms are as used in Infigen's submissions dated 8 November 2012 (**Infigen Submissions**); and

   (b) paragraph numbers are references to paragraphs of the AEMO Submissions.

B. Summary

3. Nothing in the language or the context of clause 3.16.2 supports the limitation for which AEMO contends – that the only losses that may be compensated are losses incurred by the relevant *Market Participant* in the ordinary course of its operations in the wholesale electricity market or in its capacity as a participant in the market: paragraphs 8 to 14 below.

4. In any event, the REC losses claimed by Infigen would be encompassed by AEMO's formulation: paragraphs 15 to 23 below.

5. AEMO's attempt to invoke some underlying "intention" of the makers of clause 3.16.2 is impermissible and unnecessary, inconsistent with clause 8 of Schedule 2 to the NEL; and does not, in any event, support a construction of clause 3.16.2 that would defeat Infigen's claim for compensation: paragraphs 32 to 50 below.

6. Although the *DRP* is required to consider the matters listed in clause 3.16.2(h) when making a determination as to the compensation payable, the *DRP* has no overriding

discretion to limit, as a matter of general principle, the categories of loss that may give rise to compensation: paragraphs 51 to 57 below.

7. Any complexities that may arise in calculating the amount of Infigen's loss in respect of RECs are no greater than the complexities that arise in calculating the amount of compensation that should be awarded for spot market losses; those complexities will be addressed by appropriate evidence and submissions when the *DRP* proceeds to consider how Infigen's REC losses should be calculated; they are irrelevant to the question before the *DRP* at this stage of the process: paragraphs 58 to 62 below.

C. Submissions in reply

Terms of clause 3.16.2 do not limit compensation in the manner contended

8. The essence of many of the contentions in the AEMO Submissions is that an in-principle limitation should be read into clause 3.16.2, so as to restrict the compensation that may be available under that clause. The limitation for which AEMO contends is *"*that, in order to be potentially compensable, a loss needs to have been incurred by the relevant *Market Participant* in the ordinary course of its operations in the wholesale electricity market or, at least, in its capacity as a participant in the market*"*.[1]

9. The AEMO Submissions suggest that the limitation would have the effect of restricting the compensation available under clause 3.16.2 in a manner that is additional to any restriction that might apply as a result of:

   (a) framing the entitlement to compensation by reference to loss caused by a *Generator*'s compliance with an erroneous instruction by AEMO to operate a *generating unit* at a lower level than the level at which the *Generator* would have been instructed to operate that *generating unit* if the *scheduling error* had not occurred; or

   (b) the express factors set out in clause 3.16.2(h) of the *Rules* that the *DRP* is required to take into account in determining the level of compensation to which a *Market Participant* is entitled in relation to a *scheduling error*.

10. Infigen submits that no limitation of the kind proposed by AEMO can be found in the terms of clause 3.16.2 nor when those terms are read in context; and it would be neither appropriate nor permissible for the *DRP* to impose the limitation.

11. To read into clause 3.16.2 such a limitation would constitute the kind of *"wholesale redrafting"* of a provision of the *Rules* against which the Australian Competition Tribunal warned in *Application by United Energy Distribution Pty Limited*.[2] In explaining its decision in that case, the Tribunal said:[3]

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1 AEMO Submissions, paragraph 18.

2 [2012] ACompT 1 at [61(d)].

3 [2012] ACompT 1 at [244].

> *The language deployed in the relevant subclauses is clear enough. Interpreting the language according to its ordinary meaning and in accordance with the relevant definitions contained in the Glossary for the* [Rules] *and in s 2 of the NEL does not produce absurd results. It may produce results with which the AER and the Minister disagree – disagreement which may, in the circumstances of the present case, even be supportable by reasoned argument. However, in our view, this is quite beside the point. We are not authorised to rewrite the relevant subclauses.*

12. Such an additional limitation is also inconsistent with the approach taken in the Snowy decisions, to which AEMO frequently refers in its submissions. As paragraphs 75 to 82 of the Infigen Submissions set out, the Snowy decisions adopted the following key principles:

    (a) compensation for losses in addition to "spot market trading losses" is payable out of the *Participant compensation fund*;[4] and

    (b) a *Market Participant* is entitled to compensation for "its losses caused by its compliance with [AEMO]'s instruction to operate its relevant *scheduled generating units a*t lower levels than the levels at which each would have been instructed to operate if the *scheduling errors* had not occurred" (if not for its "total loss" in the course of its operations).[5]

13. Infigen submits that the combined effect of those principles, as adopted in the Snowy decisions, is that non-spot market losses (or, in AEMO's language, losses incurred with respect to transactions undertaken outside the context of the market) are compensable if those losses are caused by the *Market Participant*'s compliance with the erroneous *dispatch instruction*.

14. For the reasons set out in section H of the Infigen Submissions and elsewhere in this reply, the reduced output of the Infigen Wind Farms caused by its compliance with AEMO's erroneous *dispatch instructions* directly caused Infigen to lose its entitlement to create LGCs in respect of those lost MWh.

15. Even if AEMO's formulation was expressed in clause 3.16.2, or the *DRP* was entitled to read such a limitation into that clause, Infigen submits that, in this case, the REC losses claimed would be encompassed by AEMO's formulation, being "losses suffered in the course of the *Market Participant*'s operations as a *Market Participant*".[6]

16. The AEMO Submissions portray Infigen's loss of RECs as, in essence, a loss arising indirectly as a result of the *scheduling error* and occurring as part of a separate "business" unconnected with Infigen's operations in the wholesale market or as a *Market Participant*.[7]

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4 *Snowy and NEMMCO*, Decision of the Dispute Resolution Panel, 1 February 2007, paragraphs 97-103.

5 *Snowy and NEMMCO*, Decision of the Dispute Resolution Panel, 29 August 2007, paragraph 36.

6 AEMO Submissions, paragraph 50.

7 For example, AEMO Submissions, paragraphs 27, 31, 39 and 51.

17. As is set out in section H of the Infigen Submissions, the loss of RECs occurs as a direct result of the reduction of the output of the *semi-scheduled generating units*. Each of the Infigen Wind Farms is an accredited power station, and each has a "1997 eligible renewable power baseline" of zero.[8] Upon generating a MWh of electricity, Infigen may therefore create and register an LGC. The loss of output therefore directly results in a lost entitlement to create and sell an LGC in a manner similar to the manner in which the loss of output gives rise to lost spot market payments.

18. In other words, it is precisely Infigen's operation in the wholesale electricity market and, more specifically, its compliance with the erroneous *dispatch instructions* it received in the course of its operations as a *Market Participant* and as a *Semi-Scheduled Generator* that, of itself and with no further intervening events, reduced Infigen's entitlement both to receive spot market payments and to create and register LGCs.

19. AEMO's characterisation also ignores the fundamental dynamics that condition the participation of *semi-scheduled generating units* (that is, wind farms) in the wholesale market. As noted at paragraphs 50 to 52 of the Infigen Submissions, the ability of wind farms to participate commercially in the market, and the substantial growth of wind generation in the market in recent years, is in large part driven by the RET and the additional revenue that wind farms can expect to receive by creating and selling LGCs. That growth in wind generation was a key part of the environment in which the specific *dispatch* process for *semi-scheduled generating* units was established, the erroneous application of which resulted in the *scheduling error* and reduced Infigen's output and thereby its LGC entitlement.

20. In that context, the characterisation of the creation and sale of LGCs by a wind farm as a voluntary activity entered into unconnected with the operation of the wholesale market cannot be sustained on any reasonable understanding of wind farms' participation in the market.

21. AEMO also seems to contend that there is a fundamental distinction between the REC losses Infigen incurred due to its compliance with the erroneous *dispatch instructions* and the settlement residue distribution agreement (**SRD**) losses for which compensation was awarded in the Snowy decisions.

22. As discussed in paragraphs 12 and 13 above, Snowy's right to compensation for its SRD losses depended on showing that those losses were caused by its compliance with NEMMCO's erroneous *dispatch instructions*.

    (a) Infigen submits that the causal nexus between compliance with the erroneous *dispatch instructions* and the relevant loss is much stronger in this case than for the SRD losses considered in Snowy.

    (b) In the Snowy case, the causal nexus was established on the premise that Snowy's compliance with NEMMCO's *dispatch instructions* caused a change in flow on

[8] As set out in the Register of Accredited Power Stations maintained by the Clean Energy Regulator under the Renewable Energy Act.

the Snowy region and NSW region interconnector, which in turn led to Snowy incurring losses under its SRD agreements.[9]

(c) Infigen notes that, in that case, NEMMCO accepted that there were instances in which the necessary causal nexus existed.[10]

23. In Snowy, an additional or alternative test of the kind proposed by AEMO was not applied to determine whether compensation was payable in respect of Snowy's SRD losses – namely, that the losses must have been incurred in the course of Snowy's operations as a *Market Participant*. In any event, Infigen disputes that SRD losses are properly characterised as occurring in a *Market Participant*'s ordinary operations and can certainly not be so characterised to any greater extent than Infigen's REC losses.

Snowy decisions – hedging contract losses

24. Paragraphs 53 and 54 of the AEMO Submissions refer to Snowy having "dropped" its claim for hedging contract losses, while pursuing and obtaining compensation in respect of spot market losses and SRD losses; and assert that those actions "are reflective of AEMO's contention that amounts in compensation are not payable out of the fund in respect of losses that do not arise out of market operations".

25. AEMO provides no evidence to support its claim that Snowy "dropped" its hedging contract loss claim "consequent upon the *DRP*'s decision" or AEMO's assertion that Snowy's decision ultimately not to pursue that aspect of its claim supports AEMO's interpretation of clause 3.16.2. Nor does AEMO cite any part of the relevant Snowy decision.

26. In paragraph 5 of the Snowy decision dated 18 October 2007 the *DRP* stated: "Snowy has not pursued its claim for contract loss and the parties are agreed that, subject to discretionary considerations, it is entitled to compensation for spot market loss and SRD loss." There is nothing elsewhere in that decision that provides any further background on why the "contract loss" (that is, the hedging contract loss) claim was not pursued.

27. There is no basis on which the *DRP* in the present case could draw any conclusions from Snowy's decision ultimately not to pursue its hedging contract loss claim. There are several possible reasons why Snowy may have elected not to pursue that aspect of its claim – reasons that are as plausible as the "explanation" given in the AEMO Submissions. Those reasons include the possibility that Snowy decided that the potential benefits of pursuing the claim would be outweighed by the costs that would be incurred in the process.

Nature of loss claimed by Infigen

28. The AEMO Submissions characterise Infigen's claim for compensation in respect of RECs as a claim for "profit lost".[11] That characterisation is misconceived.

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9 *Snowy and NEMMCO*, Decision of the Dispute Resolution Panel, 18 October 2007, paragraphs 7 to 10.

10 *Snowy and NEMMCO*, Decision of the Dispute Resolution Panel, 18 October 2007, paragraphs 9 and 10.

11 AEMO Submissions, paragraphs 4, 5 and 15.

29. The compensation Infigen seeks in respect of RECs, as part of the compensation determination to be made by the *DRP* under clause 3.16.2, is not for lost profit, but for loss of revenue that Infigen would have received had the output of the Infigen Wind Farms not been reduced because of the *scheduling error*.

30. In this context, there is no material difference between reduced spot market payments and a reduced entitlement to create and sell RECs arising from a *scheduling error*. Both involve a loss of revenue on account of the reduced output of the relevant *generating units*. Previous *scheduling error* compensation determinations have calculated the compensation payable based on the affected participant's reduced revenue, less its avoided fuel costs.[12] Infigen's claim for RECs is entirely consistent with that approach (although avoided fuel costs are not relevant to a wind farm).

31. For the reasons outlined in paragraphs 50 to 52 of the Infigen Submissions and in paragraph 19 above, the revenue that a wind farm receives from creating and selling RECs is a critical component of its financial viability and its ability to operate commercially within the wholesale market. The REC revenue is what enables a wind farm to break even with and therefore compete with fossil fuel-based *Generators;* it is not a source of increased margin or additional "profit".

Intention of drafters and extrinsic material

32. AEMO has suggested at several points that its proposed limitation should be read into clause 3.16.2 on the basis that it was intended by the drafters of the provisions that such a limitation should apply.[13]

33. Infigen submits that seeking to rely on the "intention" of the drafters of the relevant provisions is both impermissible and unnecessary. The terms of clause 3.16.2 are sufficiently clear to establish that no such limitation exists without resorting to such an exercise.[14]

34. Even if AEMO could point to evidence that the intention underpinning clause 3.16.2 was that compensation should be limited in the manner AEMO proposes, consideration of that evidence would be precluded by the principles of interpretation set out in Schedule 2 to the NEL, which apply to the *Rules* by virtue of section 3 of the NEL.[15]

35. Clause 8 of Schedule 2 to the NEL sets out when certain specified extrinsic material may be used in the interpretation of a provision of the *Rules*. To the extent that AEMO has

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12 *AGL Hydro Partnership and AEMO*, Decision of the Dispute Resolution Panel, June 2010; *Synergen Power Pty Ltd and AEMO*, Decision of the Dispute Resolution Panel, 1 October 2010.

13 For example, see paragraphs 27, 33, 36.

14 In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31], French CJ, Gummow, Hayne, Crennan and Kiefel JJ endorsed an earlier statement of Gummow J that, when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention *manifested*' by the legislation"; and said: "Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning." At [33], after citing *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550, their Honours said: "... it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction".

15 The relevant provisions of which are not purported to be excluded by clause 1.7.1 of the *Rules*.

referred to extrinsic material in the course of its contentions about the intention behind clause 3.16.2 – for example, its references to the VicPool rules – that material is neither "Law extrinsic material" nor "Rule extrinsic material", as those terms are defined in clause 8(1) of Schedule 2 to the NEL.

36. Further, the circumstances of the present case do not fall within clause 8(2a) of Schedule 2 to the NEL, which establishes when such material may be used to assist in interpreting a provision of the *Rules*.[16]

    (a) Clause 3.16.2 is not ambiguous or obscure, and the result that would be produced by the ordinary meaning of the clause would not be absurd or unreasonable.

    (b) In that context, extrinsic material can only be considered to confirm the ordinary meaning of the clause; but that is not the purpose for which AEMO seeks to use such material or to raise consideration of the intention underpinning clause 3.16.2.

37. In any event, AEMO has produced no evidence to establish that the intention underpinning clause 3.16.2 was that compensation should be limited in the manner AEMO proposes, despite the clear terms of the clause. Nor has AEMO produced any evidence to support the policy objectives that AEMO appears to contend should inform the interpretation of the clause.

38. Even if consideration of the intention underpinning clause 3.16.2 were permitted and there were some evidence to support AEMO's proposed interpretation of the clause, Infigen submits that the matters raised in the AEMO Submissions regarding that intention are not persuasive, and do nothing to overcome the absence of anything in the terms of clause 3.16.2 itself to support AEMO's proposed interpretation.

39. For example, paragraphs 32 and 33 of the AEMO Submissions contend that, as the provisions relating to the *Participant compensation fund* take their genesis from the VicPool rules that governed the Victorian wholesale electricity market in the 1990s, those provisions "would not have been intended to capture losses of the type now claimed by Infigen, especially as the regime for RECs did not then exist".

40. Sir Anthony Mason AC KBE, Mr G H Thorpe and Mr K Brown addressed a similar argument advanced by NEMMCO in the Snowy decision dated 1 February 2007, when they rejected the proposition that compensation under clause 3.16.2 is limited to spot market losses. NEMMCO's argument to that *DRP* was based on the same VicPool rules, to which AEMO has referred in its submissions in the current case.[17] At paragraph 99 of its decision, the *DRP* said:

> *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.*

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16 See also the discussion of the approach to statutory construction in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31] to [33], referred to in footnote 14 above.

17 The Snowy decisions refer to those rules as the "Victorian Power Exchange Rules".

41. Infigen further submits that there are no justifiable grounds for assuming that the intention of the relevant provisions of the VicPool rules was to limit their application (and the application of similar provisions that might subsequently be adopted for the purposes of a future national market) to matters that were specifically in the contemplation of the drafters at the time when the VicPool rules were first adopted. Infigen notes, in this context, that the VicPool rules not only predate the RET, but also predate the existence of the National Electricity Market.

42. The National Electricity Rules, version 1 of which did not commence until 1 July 2005 (several years after the commencement of the RET), have been amended 51 times. A significant number of amendments had also been made to the National Electricity Code, which predated the National Electricity Rules. None of those amendments sought to limit the availability of compensation under clause 3.16.2 to exclude RECs, notwithstanding that clause 3.16.2 was amended expressly to include *Semi-Scheduled Generators* (that is, wind farms) in current clause 3.16.2(d), which establishes the right of *Generators* who comply with an erroneous *dispatch instruction* to receive compensation.

43. AEMO also contends, at paragraphs 36 to 40 of the AEMO Submissions, that "these matters of likely intention of the Rules-making body find direct expression in the *Rules*". AEMO points to the fact that, under clause 3.16.2, Infigen's entitlement to compensation arises because it is a *Market Participant* and a *Semi-Scheduled Generator*[18] and to various other provisions in the *Rules* relating to *semi-scheduled generating units* and *market generating units*.

44. Infigen submits that there is nothing in the provisions cited by AEMO that supports its contention that compensation under clause 3.16.2 is limited, as a matter of principle, in a manner that would exclude REC losses. The references to *Market Participants* and *Semi-Scheduled Generators* in clause 3.16.2 identify the class of persons eligible to receive compensation, not the types of compensation that may be awarded to those persons.

45. Each of the relevant *generating units* of the Infigen Wind Farms is, and was at all material times, classified as a *semi-scheduled generating unit* and a *market generating unit*, and Infigen is therefore both a *Market Participant* and a *Semi-Scheduled Generator* for the purposes of clause 3.16.2 and a person to whom compensation is payable under that clause.

46. In any event, the relevant "activities" of Infigen to which the *scheduling error* relates, and in relation to which the relevant REC losses were incurred, was the generation of electricity under the *central dispatch process* operated by AEMO, which process AEMO failed to follow and therefore declared that a *scheduling error* had occurred.[19] The inability to create (and accordingly sell) LGCs was the direct consequence of the reduction in output of the Infigen Wind Farms, and their input into the wholesale electricity market, in compliance with AEMO's erroneous *dispatch instructions*.

47. In paragraphs 44 and 45 of the AEMO Submissions, AEMO refers to clauses 8.2.1(e)(1) and (2) of the *Rules*, which provide that the dispute resolution regime set out in or

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18 See clause 3.16.1(a), (b) and (d) of the *Rules*.

19 See clause 3.8.24 for the circumstances in which a *scheduling error* occurs.

implemented in accordance with the *Rules* and described in rule 8.2 should, to the extent possible:

(a) be guided by the *national electricity objective*; and

(b) be simple, quick and inexpensive.

48. Infigen submits that those provisions establish guiding principles for the conduct of the dispute process provided for in Chapter 8 of the *Rules*; but they are not rules to be applied in interpreting the meaning of clause 3.16.2 (a provision that falls outside the dispute resolution provisions in rule 8.2, to which the guiding principles identified in clause 8.2.1(e) are expressed to apply).

49. In any event, there is nothing in those principles that would permit the *DRP* to depart from the ordinary meaning conveyed by clause 3.16.2 and impose an additional limitation on that clause that is not supported by its words, or otherwise to pre-empt the determination that the *DRP* is to make under clause 3.16.2. In particular, the suggestion that compensation that would otherwise be available should be denied because denying compensation would lead to a simpler, quicker or more inexpensive process[20] would produce manifestly arbitrary and unjust outcomes.

50. Infigen further submits that interpreting clause 3.16.2 in a manner that allows a *Market Participant* to be compensated for losses caused by its compliance with an erroneous *dispatch instruction* (subject to the discretionary factors listed in clause 3.16.2(h), which the *DRP* must consider) is entirely consistent with the *national electricity objective*.

(a) Efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity depends on the expectation that the *central dispatch process* will be operated by AEMO in accordance with the *Rules*.

(b) Payments out of the *Participant compensation fund* for losses, which a *Market Participant* can establish were incurred because of AEMO's failure to follow the *central dispatch process*, help mitigate the market distortions that would otherwise arise because of that failure.

DRP discretion

51. AEMO contends that the *DRP* has discretion in determining the compensation to be paid out of the *Participant compensation fund* and should exercise that discretion to limit compensation in a manner that would exclude recovery of REC losses.[21]

52. Infigen does not dispute that clause 3.16.2 grants the *DRP* a discretion in making a determination as to compensation. In determining the level of compensation to which an applicant such as Infigen is entitled, clause 3.16.2(h) expressly requires the *DRP* to take into account the current balance of the *Participant compensation fund* and the potential for future liabilities, and to recognise that the aggregate liability cannot exceed the balance of

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20 See AEMO Submissions, paragraph 45.

21 AEMO Submissions, paragraphs 41ff.

the fund that would have been available at the end of the year if no compensation was paid. These express provisions recognise the limited nature of the fund and the fact that *Participants* may be required to contribute to the fund.

53. However, there is no foundation for a contention that, in addition to taking into account those matters, the *DRP* should exercise some overriding discretion to limit, as a matter of general principle, the categories of loss that may give rise to compensation, which is the question currently at issue before the *DRP*.

54. The position outlined in paragraph 53 above is supported by comments of the *DRP* in the Snowy decision dated 1 February 2007, made in response to NEMMCO's argument that the *DRP* should exercise its discretion to restrict compensation under clause 3.16.2 to spot market losses:[22]

> *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.*

55. The discretion that AEMO asserts the *DRP* should exercise in the present case is, like the discretion proposed by NEMMCO in Snowy, in the nature of an "absolute rule to be applied in every case". The discretion now proposed is articulated in paragraph 43 of the AEMO Submissions:

> *... this discretion ought be exercised so as only to allow recovery of a loss incurred by a Market Participant in the ordinary course of its operations in the wholesale electricity market or, at least, in its capacity as a participant in that market.*

56. Infigen submits that no such "absolute rule" can properly be imposed by the *DRP* as a matter of discretion. The *DRP* may exercise its discretion in determining the amount of compensation that should be awarded in a particular case, taking into account the balance and status of the fund, as directed by clause 3.16.2(h) of the *Rules*; but such a discretion cannot, and should not, be used as a mechanism for implementing an interpretation of the clause that would not otherwise be apparent on the terms of the clause itself.

57. Should the *DRP* determine that clause 3.16.2 does not prevent Infigen being awarded compensation for REC losses, Infigen will make more detailed submissions on how the express discretionary factors relating to the status of the fund should be applied by the *DRP* in this case. However, Infigen notes that paragraphs 83 to 85 of the Joint Submissions establish that, if Infigen were paid in full (including for its REC losses), a substantial sum would remain in the *Participant compensation fund.*

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22 *Snowy and NEMMCO*, Decision of the Dispute Resolution Panel, 1 February 2007, paragraph 102.

Calculation issues

58. AEMO makes a number of contentions in support of limiting the compensation available under clause 3.16.2. These include that calculating the amount of compensation to which a participant may be entitled for REC losses would be complex, and would depend on matters about which AEMO and other participants have limited information or expertise.[23]

59. Infigen submits that any issues that might arise about how to calculate the amount of a participant's loss in respect of RECs will be relevant to the amount of compensation to be awarded, but not to whether clause 3.16.2 permits compensation to be awarded. They are not issues that are relevant to the question before the *DRP* at this stage of the process.

60. In any event, the issues that may arise in calculating the amount of a participant's loss in respect of RECs, including the issues that AEMO raises in its submissions, are not unusually complex. Indeed, they are far less complex than the calculation issues that will frequently arise in determining the amount of compensation that should be awarded for spot market losses, and those that might arise in a claim for losses relating to other risk management mechanisms or financial derivatives, such as hedge losses or SRD losses of the kind considered in the Snowy decisions.

61. Paragraph 14(b) of the AEMO Submissions states: "Historically, there have been significant fluctuations in the market price of RECs." Infigen disputes that the fluctuations have been "significant", especially when contrasted with the fluctuations that occur for the spot price in the wholesale electricity market. During the period when the *scheduling error* affected the Infigen Wind Farms, and particularly since 1 January 2011 when the LGC market was separated from the STC market, LGC prices have in fact been relatively stable.[24]

62. Evidence and submissions will be made by Infigen on the matters that AEMO raises in its submissions (including the matters listed in paragraph 46 of the AEMO Submissions) when the *DRP* proceeds to consider how Infigen's REC losses should be calculated; expert assistance will be readily available, and could be called on by the *DRP* if necessary.

DATED: 12 November 2012

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MINTER ELLISON
Solicitors for Infigen

These submissions were settled by Peter Hanks QC

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23 For example, AEMO Submissions, paragraphs 14, 24, 25 and 46.

24 CCA Issues Paper, page 22.